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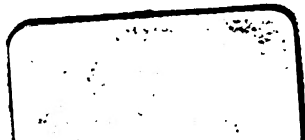


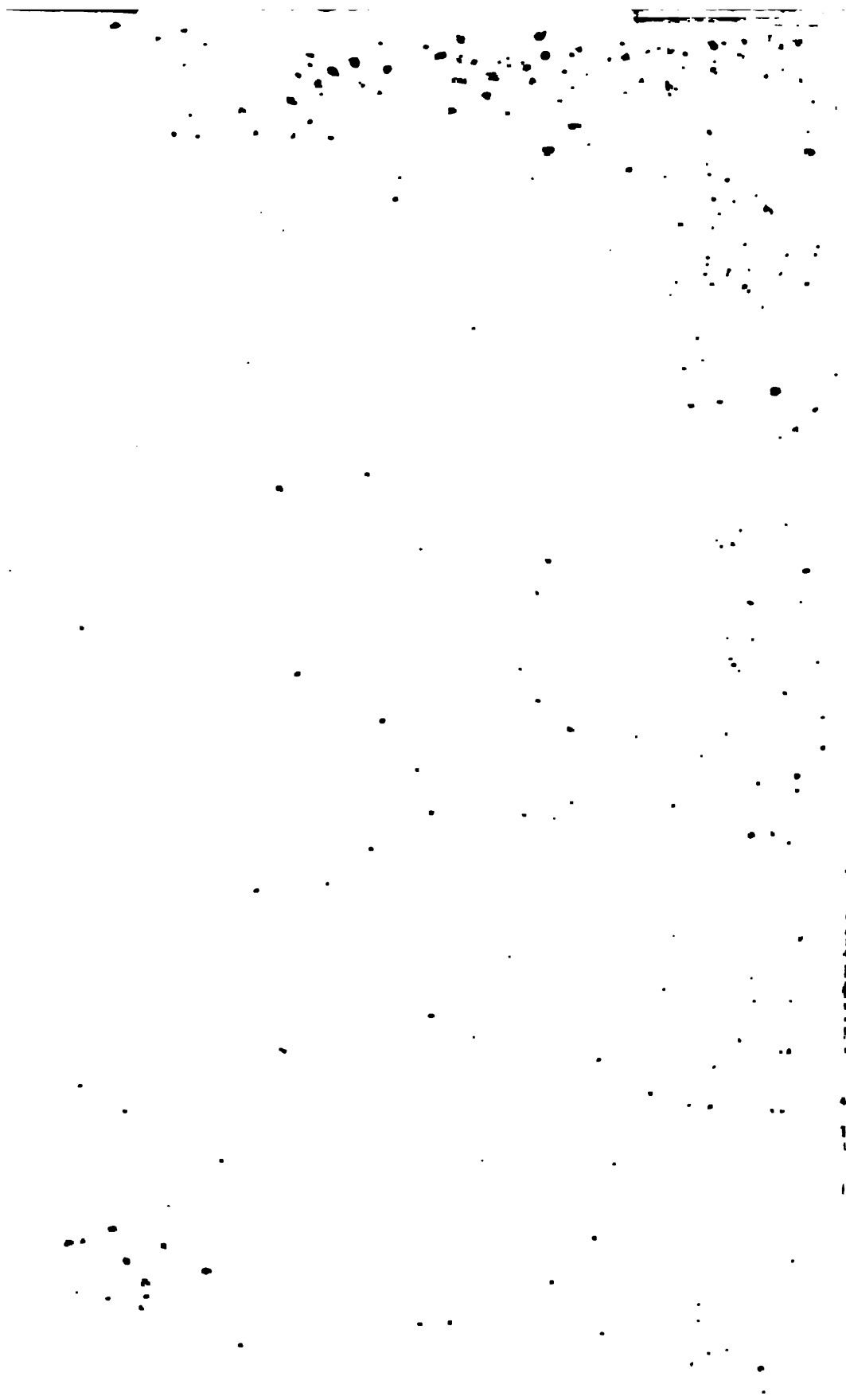
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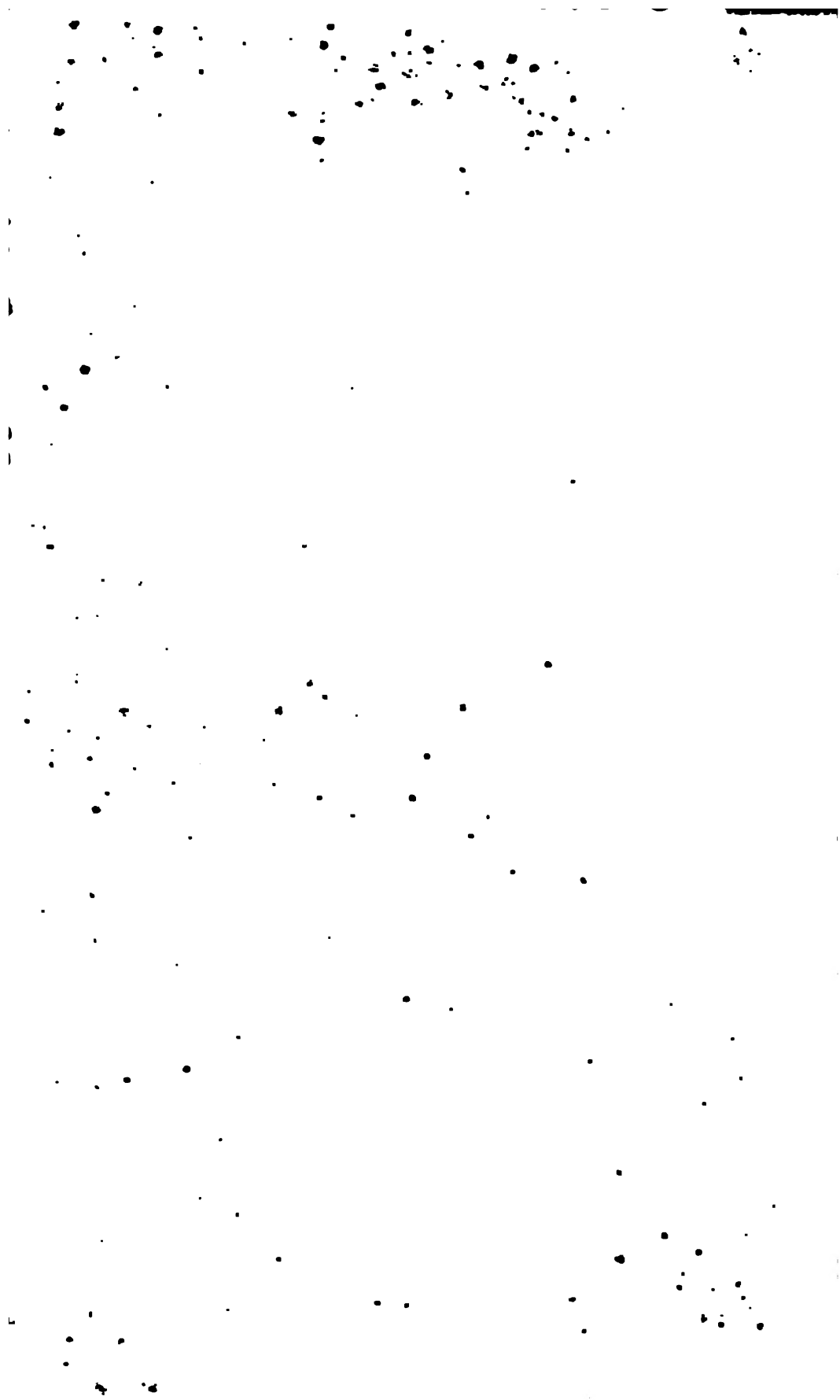




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65/23

REPORTS OF CASES

BEFORE

THE HIGH COURT

AND

CIRCUIT COURTS OF JUSTICIARY IN SCOTLAND.

DURING THE YEARS 1861, 1862, 1863, AND 1864.

BY

ALEXANDER FORBES IRVINE,

ADVOCATE.

VOL. IV.

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J U D G E S
OF THE
COURT OF JUSTICIARY
DURING THE PERIOD OF THESE REPORTS.

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1852. THE RIGHT HONOURABLE DUNCAN M'NEILL.

LORD JUSTICE-CLERK.

1858. THE RIGHT HONOURABLE JOHN INGLIS.

LORDS COMMISSIONERS OF JUSTICIARY

1851. JOHN COWAN, LORD COWAN.

1854. GEORGE DEAS, LORD DEAS.

1855. JAMES CRAUFURD, LORD ARDMILLAN.

1858. CHARLES NEAVES, LORD NEAVES.

1862. CHARLES BAILLIE, LORD JERVISWOODE.

LORD ADVOCATE.

1850. JAMES MONCREIFF.

SOLICITORS-GENERAL.

1855. EDWARD FRANCIS MAITLAND.

1862. GEORGE YOUNG.

ADVOCATES-DEPUTE.

1854. DONALD MACKENZIE.
1855. DAVID HECTOR.
1857. FREDERICK LEWIS MAITLAND-HERIOT.
1859. WILLIAM IVORY.
1861. ADAM GIFFORD.
1862. ALEXANDER MONCRIEFF
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REPORTS, &c.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

LORDS COWAN, DEAS, ARDMILLAN, AND NEAVES.

WILLIAM HARCOURT AND PETER PRIESTLY, Suspenders—*John Burnet.*

AGAINST

WILLIAM CAMPBELL LOW, Respondent—*Johnstone.*

SUSPENSION—STATUTE 2D AND 3D WILL. IV. c. 68 (Day-Poaching Act).—Under the Day-Poaching Act, 2d and 3d Will. IV. c. 68, no formal copy of citation is required, if a copy of the deliverance of the Justices ordering the party to appear at the time and place specified is duly served upon him.

THIS was a suspension of a conviction by Justices of the Peace under the act 2d and 3d Will. IV. c. 68 (commonly called the Day-Poaching Act, sections 2, 7, 8, 11, and 15), following on a petition and complaint at the instance of the respondent, Procurator-fiscal of the Justice of Peace Courts for the stewartry of Kirkcudbright. Upon the petition, and the oath of Daniel M'Gunneas, game-watcher, who deponed to the facts, the following deliverance was made :—

No. 1.
Harcourt
& Priestly
v. Low.
High Court.
Jan. 14.
1861.
Suspension.

The Justice having considered the foregoing petition and complaint, and the oath of the before-designed Daniel M'Gunneas thereto subjoined, of date the 8th day of October current, grants warrant to any

No. 1. of the constables of Court to serve a copy of the said petition and com-
Harcourt plaint, oath, and of this deliverance, on each of William Harcourt,
& Priestly Peter Priestly, and James Garrett, complained of, personally, or at
v. Low. their usual places of abode, in terms of the statute, and ordains them
High Court. to appear before me, or any one or more of Her Majesty's Justices of
Jan. 14. the Peace for the stewartry of Kirkcudbright, within the ordinary
1861. Court-room in Creetown, on Friday the 12th day of October current,
Suspension. at 12 o'clock noon, to answer to the charge contained in said com-
plaint, with certification, and grants warrant to cite witnesses for both
parties to appear at the same time and place.

Following this deliverance was a certificate signed by William M'Gowan, constable, stating that he delivered, in presence of one witness, whose signature was also adhibited, a just copy of the petition and complaint, oath, and deliverance, to each of the parties personally apprehended.

On the defenders being called (12th October 1860), William Harcourt and Peter Priestly appeared and objected, by an agent, to the Court entertaining the case, on the ground that they were not legally convened, because the summons in obedience to which they appeared, bore to be under the hand of a steward-officer, and not of a constable, as required by the Justice's warrant. They maintained that the execution adjected to the complaint was false, and produced the notice which had been served upon them, which was signed 'William M'Gowan, steward-officer.' They also craved, in case of the objection not being otherwise sustained, that the Court should adjourn to enable them to lead evidence upon the point. The Justices repelled the objections, and refused to allow the adjournment craved. The defenders then left the Court, and a proof being then led, a conviction was obtained, and the defenders were sentenced to forfeit one pound sterling each, or imprisonment for a specified period in default of payment.

The reasons for suspension of the conviction were the following :—

1. The citation of the complainers was contrary to law, in respect it was given by a person calling himself

steward-officer, whereas it could only be competently given by a Justice of Peace constable.

2. The citation was also illegal, in respect it was made before only one witness.

3. The proceedings were illegal, in respect the parties proceeded to take evidence of the complaint, and convicted the complainers in their absence, without having first, as the statute requires, heard proof that the complaint was duly served in terms of the statute.

It was admitted in the present discussion that William M'Gowan was a constable as well as a steward-officer, but it was maintained that the citation, being signed by him in his capacity of steward-officer only, was void. The case of *Gunn v. Procurator-fiscal of Caithness-shire*, November 24, 1845, Broun, vol. ii. p. 554 (a case of assault on a sheriff-officer acting as a constable), was relied on. The following references were made in the course of the argument, A. S., 8th July 1831; Bell's Notes to Hume, p. 223; *M'Kirdy v. M'Callum*, High Court, June 25. 1855, Irvine, vol. ii. p. 202; *Waddell v. Romanes*, High Court, Mar. 4. 1857, Irvine, vol. ii. p. 611. On the objection that the citation was before one witness only, the authorities cited were the Act 1686, c. 4, not repealed by the Justice of Peace Act, Barclay's Justice of the Peace, p. 458.

The respondents contended that the proceedings complied with the statute under which the prosecution was led; and also that all question was excluded by the 15th section of the statute limiting the mode of review.

The LORD JUSTICE-CLERK.—My Lords, I have found no difficulty in forming an opinion in this case, attending to the precise terms of the Act of Parliament on which we must proceed. The Act regulates the mode in which parties and witnesses are to be brought before the Justices; in some cases it is by actual apprehension, in others they are summoned to appear before the Court, and the directions for the mode in which they

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No. 1. are summoned to appear are given in the 11th section
Harcourt of the statute, which provides—‘ Where any person
& Priestly ‘ shall be charged, on the oath of a credible witness,
v. Low. ‘ with any such offence before a Justice of the Peace,
High Court, ‘ the Justice may summon the party charged to appear
Jan. 14. ‘ before himself, or any one or two Justices of the
1861. ‘ Peace, as the case may require, at any time and place
Suspension. ‘ to be named in such summons.’ The Justices are
to issue the writing which in the statute is called a
summons, and the summons must specify the precise
time and place at which the party is to appear. The
statute proceeds to say what shall be done if such
party do not appear, ‘ then, upon proof of the due ser-
‘ vice of the summons,’—and it also specifies what is
a due service of the summons,—‘ by delivering a
‘ copy thereof to the party, or by delivering such copy
‘ at the party’s usual place of abode, to some inmate
‘ thereat, and explaining the purport thereof to such
‘ inmate,’ the Justice is entitled to proceed even in
the absence of the party. Now, if the complainers
have, in terms of this 11th section of the statute, been
served with a copy of the summons, the whole of
their objections must fail. In order to determine this,
let us look at the proceedings. I think the Justice
understood very well the kind of writ which he was
to issue, and which, in the language of the Statute, is
called the summons. He ‘ grants warrant to any of the
‘ constables of Court to serve a copy of the said petition
‘ and complaint, oath, and of this deliverance, on each,
‘ &c., personally, or at their usual place of abode, in
‘ terms of the statute, and ordains them to appear be-
‘ fore me, at time and place specified, with certification,
‘ &c.’ That is not an ordinary warrant of citation,
such as a Justice of the Peace would issue in an ordin-
ary proceeding at common law. He ordains them to
appear at time and place specified. Now, what is the
duty of the officer of Court? Unquestionably to com-
municate this deliverance to the party whom it affects.

But what is the mode in which this is to be done? The statute affords the answer. The service is good if it be proved that the officer delivered a copy of the summons to the party. The question comes then to this: Had the Justices evidence that service of the summons had been given? They had more formal evidence than necessary, because they had an execution by their officer, which bore, 'This I did by delivering to each, &c., all personally apprehended, a just copy of the said petition and complaint, oath, and deliverance, in presence of Thomas Crosbie, residing at Creetown. (Signed) Wm. M'Gowan, constable, Thomas Crosbie, witness.' There is not a word about leaving a just copy citation, simply because the statute does not require anything of the kind.

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These particulars being complied with, I think it unnecessary to look at this thing called a copy citation. The objection to it as such is very narrow, but I do not think it necessary to go into that, because the delivery of a copy of the summons is all that is required by the statute, and that was delivered to the party by a constable.

The rest of the Court concurred, and the suspension was refused, with expenses.

WILLIAM C. STEWART, S.S.C.—SCOTT, BRUCE, & GLOVER—Agents.

SAMUEL ANDERSON, Suspender—*John Burnet*,

AGAINST

ROBERT BLAIR, Respondent—*A. R. Clark*.

STATUTE 2D WILL. IV. c. 34—BASE AND COUNTERFEIT COIN—INDICTMENT—RELEVANCY.—Objection to the relevancy of an indictment for uttering base coin on two occasions within ten days of each other, that it did not set forth that the coin uttered on the second occasion was different from that uttered on the first—Repelled, after enquiry as to the practice of libelling such cases; but observed by the Court, that the form of libelling ought to be made more distinct in future.

No. 2.
Anderson v.
Blair.

High Court.
Jan. 14.
1861.

Suspension.

ON 7th September 1860, the suspender was indicted on a libel before the Sheriff-Court of Renfrewshire, which set forth :

ALBERT, by an act passed in the second year of the reign of his late Majesty, King William the Fourth, chapter thirty-four, entitled, ' An Act for consolidating and amending the laws against offences relating to the coin,' it is enacted, by section 7th of the said Act, ' That if any person shall tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be imprisoned for any term not exceeding one year ; and if any person shall tender, utter, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off, any more or other false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the King's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding two years.' Yet true it was, and of verity, that the said Samuel Anderson [the complainer] was guilty of the statutory crimes and offences above libelled, or of one or other of them, actor or art and part ; in so far as—(1.) on the 15th day of August 1860, in or near the public-house or premises situated in or near Fore Street, Port-Glasgow," &c., [the complainer] ' did, wickedly and feloniously, tender, utter, or put off as genuine, a false or counterfeit coin, resembling, or apparently intended to resemble or pass for, a florin piece of the Queen's current silver coin, he knowing the same to be false or counterfeit, by then and there delivering or tendering the same as genuine, to Eliza M'Kay or M'Ninch, wife of the said James M'Ninch, in payment of a glass or thereby of whisky, then and there purchased, or proposed to be purchased by' [the complainer]: ' Likeas—(2.) on the 15th day of August aforesaid, and being on the day of the tendering, uttering, or putting off of

‘ the false or counterfeit coin above libelled, or within the space of ten days then next ensuing, in or near the spirit shop or premises in or near Dockhead Street, in Port-Glasgow,’ &c., [the complainer] ‘ did, wickedly and feloniously, tender, utter, or put off as genuine, a false or counterfeit coin resembling, or apparently intended to resemble or pass for, a florin piece of the Queen’s current gold or silver coin, he knowing the same to be false or counterfeit, by then and there delivering or tendering the same as genuine to Mary Wilson or Marks, wife of the said James Marks, in payment of a glass or thereby of ale, then and there purchased or proposed to be purchased’ [by the complainer].

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An objection was stated to the relevancy, that it did not set forth that the coin alleged to have been tendered on the second occasion was different from the one alleged to have been tendered on the first. The Sheriff repelled the objection, and the complainer pleaded not guilty.

The suspender was tried before a jury, and convicted on 18th September last, the verdict being in these terms :—

‘ The jury, by the mouth of their chancellor, unanimously find the panel guilty of having tendered, uttered, and put off, false or counterfeit coin, resembling, or apparently intended to resemble or pass for, the Queen’s current gold or silver coin, knowing the same to be counterfeit as libelled.’

The sentence was one year’s imprisonment.

The suspender presented a bill of suspension and liberation against the sentence, repeating the objection to the relevancy.

The respondent replied, that the form of libel used was conform to practice, and that the true meaning of it was, that the coin second tendered was different from the coin first tendered.

The Court having appointed the parties to report as to the practice, it appeared that, with a very few exceptions, the practice had been to libel in the manner which the respondent had followed.

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The Court refused the bill of suspension and liberation, judgment being delivered by

The LORD JUSTICE-CLERK.—This is a suspension of a sentence pronounced by the Sheriff-substitute of Renfrewshire, following on the verdict of a jury finding the suspender guilty of the charge under the Coining Act as libelled in the libel before us. That libel sets out the statute in common form, and the portion of the statute which is libelled in this way describes two offences. The first is, ‘if any person shall tender, utter, or put off, any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King’s current gold or silver coin, knowing the same to be false or counterfeit;’ and the second offence is, that if he shall do so, and ‘shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King’s current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off, any more or other false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the King’s current gold or silver coin, knowing the same to be false and counterfeit.’

Now, the substance of the difference between the two offences which are thus described in the statute seems to be this: The one is the simple act of tendering, uttering, or putting off a false coin, in the guilty knowledge of its being false; and the second is the act of a person who, having tendered, uttered, or put off a false or counterfeit coin, knowing it to be false, proceeds, on the same day, or within ten days thereafter, to utter or put off other money in the same guilty knowledge.

The two branches of the minor proposition, dis-

tinguished by the figures 1 and 2, apply to these two charges. The first has application to the former, and more simple charge, the second to the second charge.

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The Court have no doubt that, in order to the contravention of that part of the act second libelled, it is necessary that the coin tendered, uttered, or used on the second occasion, should be a different coin from that tendered, uttered, or used on the previous occasion ; and they do not intend to express any doubt that it must appear in the libel that it was a different coin. Because that is clearly required by the Act of Parliament. But the question is, whether the minor proposition of the libel in the second charge does or does not sufficiently indicate that the coin on the second occasion is different from that alleged to have been tendered on the previous occasion.

Now we have, though with great difficulty, come to the conclusion that, on a fair reading of the second charge in the minor, the coin there mentioned is alleged to have been a different coin from the coin mentioned in the first branch of the minor proposition.

But the Court cannot but say, that this is a matter of so much importance, and so essential to the relevancy of the charge in the second branch of the minor, that it should always be very clearly alleged that the coin mentioned in the second branch of the minor was a different coin from the one mentioned in the first branch of the minor ; and the difficulty which the Court have felt in reading this libel, so as to hold it relevant, will prove sufficiently the necessity of being very careful in libelling this offence in future.

The Court have not been unmoved by what has been stated to them as to previous practice, and had it not been for that practice there might have been more difficulty in sustaining this libel ; but it is impossible, whether looking to the previous practice or not, to say that this libel is expressed as clearly as it should have been expressed.

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While it is the duty of the prosecutor to libel that the coin on the second occasion was a different coin from the coin on the first occasion, it does not follow that the prosecutor is bound directly to prove that. The statute lays on him the burden of allegation; but the burden of proof may be on the other side. Because the allegation that the coin on the second occasion was a different coin from that on the first occasion, is to some extent an allegation of the negative of the proposition that the two coins were the same, and whether the prosecutor is or is not bound to prove that negative, is a question not entertained or disposed of in the present case.

The result is, that the Court sustain the libel, and refuse the suspension.

JOHN THOMSON, S.S.C.—JOHN PATTEN, W.S.,—Agents.

Present,

THE LORD JUSTICE-GENERAL,

THE LORD JUSTICE-CLERK.

LORDS COWAN, DEAS, ARDMILLAN AND NEAVES.

THE DUKE OF RICHMOND, Appellant,—*Lord Advocate Moncreiff—*
A. R. Clark.

AGAINST

PETER DEMPSTER, Respondent,—*Fraser—Skelton.*

No. 3.
Duke of
Richmond
v.
Dempster.
High Court.
Jan. 14.
1861.
Suspension.

STATUTE 8TH AND 9TH VICT., c. 26—TROUT FISHING—LANDLORD AND TENANT—An agricultural tenant has no right to fish with net for trout or other fresh water fish in a stream on his farm; and if he do so without permission, he is liable to the penalties of contravening the Act 8th and 9th Vict. c. 26.

THIS was a complaint to the Sheriff of the county of Aberdeen, proceeding on the Act 8th and 9th Vict.

c. 26, which prevents fishing for trout or other fresh water fish, by nets, in the rivers and waters of Scotland.¹

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Duke of
Richmond
v.
Dempster.

The appellant set forth, that the respondent, his tenant in the farm of Pitscurry, had been guilty of a contravention of the above statute, in so far as, at a particular time mentioned, he had fished for trout or other fresh-water fish, by means of nets, in the Deveron, at a place where it flowed by or through his farm, he having at that time no right, or written permission from the proprietor, or other person entitled to give it, to fish there with nets; and the appellant accordingly prayed to have the respondent amerced in the statutory penalties.

High Court.
Jan. 14.
1861.
Suspension.

The respondent objected to the relevancy of the indictment, that it was not a contravention of the statute for a tenant to fish upon his own farm.

The Sheriff-substitute sustained the objection, and the appellant having appealed to the Circuit Court at Aberdeen, the case came before the Lord Justice-Clerk and Lord Ivory, when it was remitted to the High Court—a minute being lodged by the parties admitting that the respondent was tenant in Pitscurry, and the

¹ ' That it shall not be lawful for any person whatsoever, not being the proprietor of the land through or by which any river or water flows, or on which any loch is wholly or partially situated, or not having a right there to fish for trout or other fresh-water fish, or not having a written permission from some such proprietor or person entitled to fish as aforesaid, at any time after the passing of this Act, to fish for trout or other fresh-water fish in any such river, water, or loch in Scotland, with any net of any kind or description; and if any person, not being a proprietor, or having right or permission as aforesaid, shall wilfully take, fish for, or attempt to take, or aid and assist in taking or fishing for, or attempting to take or fish for, in or from any such river, water, or loch, any trout or other fresh-water fish by or with any net of any kind or description, such person shall forfeit and pay any sum not exceeding £5 for every such offence, besides forfeiting the trout or fish taken, and also every boat or net in or by which the same may have been taken or attempted to be taken, and shall also pay the full expenses of the conviction.'

No. 3. lease being produced to show that it contained no special
 Duke of provision which could affect the question.
 Richmond

v. Before the High Court, the LORD ADVOCATE and CLARK,
 Dempster. for the appellant, argued—The right to fish for trout in
 High Court. a river belonged to the proprietor of the adjacent land,
 Jan. 14.
 1861.

Suspension. and a person who might have legally access to the banks,
 did not thereby become entitled to fish for trout—*Fer-*
gusson v. Shirreff, July 18. 1844, 6 D.B.M. 1363. A
 tenant of a farm had right only to the agricultural
 produce of the soil—*Stair*, ii. 9. 1 ; *Erskine*, ii. 6. 20.
 Thus he could not kill the game—*Hopetoun v. Wight*,
 January 17. 1810, F.C. The exception allowed in the
 case of foxes, *Colquhoun*, M. 4997, and of rabbits,
Moncrieff v. Arnot, February 13. 1828, 6 S. & D. 530,
 was because they destroyed the agricultural produce—
Craig, ii. 8. 22.

FRASER and SKELTON, for the respondent—The case is
 one of nicety, and is novel in so far as in former ques-
 tions as to fishing have not been between landlord and
 tenant, but between conterminous proprietors. It is
 necessary to attend particularly to the terms of the
 statute, which is directed, not against those who have
 permission of any sort to fish, but against poachers. If
 we are entitled to fish with rod, then, in so far as re-
 gards the penalties of the statute, we may fish with net
 also. It has no exclusive reference to netting. A ten-
 ant comes under the second exception of the statute.
 We contend—1. That trout are animals *feræ naturæ*, and
 so are *res nullius* ; and, 2. That as between landlord and
 tenant the right of taking fresh-water fish is not one of
 those exclusive rights reserved by law to the landlord ;
 if reserved, the reservation must be expressed. These
 propositions are maintained very strongly by the In-
 stitutional writers—*Erskine*, ii. 1. 10 ; *Stair*, ii. 3. 69
 and 76 ; *Bankton*, ii. 1. 7. The same doctrine is
 laid down by Hutcheson, whose work on the office
 of Justice of the Peace was revised by an eminent
 Judge.

The LORD JUSTICE-GENERAL.—I have heard that very authoritatively contradicted.¹

SKELTON.—Any one in full possession of the banks of a river may take trout. Before the case of *Fergusson v. Shirreff* this was undoubted. *Carmichael*, M. 9645; *Mackenzie v. Rose*, May 26. 1830, 8 S. and D. 816, affirmed in the House of Lords, May 14. 1832, 6 W. S., p. 31, and the opinions of the Judges in that case, especially of Lord Glenlee. The tenant is in legal occupation of the banks of the stream, and is no more a trespasser on the water than on the adjoining land. The case of *Fergusson v. Shirreff* was said to be contrary to this view, and was indeed the only authority to be relied on on the other side; but that case was one as to which there was considerable difference of opinion—the decision of it was against the authority of Lord Stair. It was a civil cause, and so perhaps not of so much authority in a criminal prosecution (see observations of Lord Justice-Clerk Hope in *Porter v. Stewart*, Irvine vol. iii. p. 57.) But even supposing it to be well decided, it did not militate against the argument, because the defender there had not full legal possession of the banks—he had only a servitude of passage, which must not be enlarged or diverted from the precise and special purpose for which it exists.

The LORD JUSTICE-CLERK.—The case of *Shirreff* was a case of a public road, not of a servitude at all. The two things are very different.

COUNSEL for the Respondent.—As to the cases on the game laws, these were special, and the principle on which the tenant has in other cases been allowed to kill other wild animals is not that they are destructive, for

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¹ It is remarkable, however, that in the dedication to Sir Ilay Campbell of Succoth, the work is described as undertaken at 'his suggestion and executed under his inspection,' and the preface refers to the 'regular revisal of the whole work' by that Judge.

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he may kill wild animals which are not game, and which are not destructive.

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LORD DEAS.—There is a point on the form of the libel. The statute makes an exemption from penalties in favour of those who have permission to fish in the water, without specifying fishing by rod, or by net, or by what means. Do you think the libel properly negatives that, when it says that the respondent had no right to fish with net ?

The RESPONDENT.—No ; the libel should expressly negative the exception in the statute—*Thibault v. Gibson*, 12 Meeson and Welsby, p. 88.

The APPELLANT.—The statute deals only with fishing by net. ‘To fish’ standing alone in it, means to fish by net.

At advising—

The LORD JUSTICE-CLERK said—This case originated in a complaint at the instance of the Duke of Richmond, addressed to the Sheriff of the county of Aberdeen, complaining of a contravention of the statute regarding netting for fresh water fish by the other party Peter Dempster ; and, upon a consideration of that libel when it first came before the Sheriff, he sustained an objection to its relevancy. It does not appear from the interlocutor of the Sheriff upon what ground he proceeded in holding the libel to be irrelevant. But the case was appealed to the Circuit Court, and when it came before Lord Ivory and myself at Aberdeen, it was explained to us by the counsel for both parties that the ground upon which the Sheriff proceeded was, that it appeared upon the face of this libel that the defender was the agricultural tenant of the land by or through which the stream flowed, in which he was alleged to have fished for trout or other fresh-water fish with a net ; and that the Sheriff had held that that was sufficient, upon the face of the libel, to show that the defender could not be guilty of the offence, because he was in the occupation of the land as an agricultural tenant. It was

represented to us farther, by the counsel for the parties, that this was considered to be a question of general importance, and it was suggested either by them, or by the Court—I am not at this moment prepared to say which—that it might be a proper case for certification to the High Court. Lord Ivory and I felt that it would be improper to certify it to the High Court as a case of general importance unless we were quite sure that it involved no specialty which would take away from its general importance; and therefore we desired, before determining upon the course which we should follow, to see the lease under which the defender held the lands of Pitscurry. That lease was produced, and it appeared to us upon reading it, that it did not introduce any specialty, and therefore we came to be of opinion that the case ought to be certified. The lease is not properly here at all, but was laid before the Circuit Court for the purpose of satisfying the Judges on Circuit that the question was raised in a pure form.

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Now, in dealing with it in the manner in which it was dealt with by the counsel in debate, the question comes to be, whether this libel is relevant or irrelevant. It is a libel proceeding upon the 1st section of the Statute 8th and 9th Vict. cap. 26, which imposes a penalty upon any person who fishes 'for trout or other fresh-water fish in any river, water, or loch in Scotland with 'any net of any kind or description;' but which introduces in the same clause certain exceptions from that general enactment. By virtue of these exceptions, the statute does not apply to persons who are in the situation either of being the proprietor of land through or by which the river or water flows, or in which the loch is wholly or partially situated; and it does not apply to any one who has a right there to fish for trout or other fresh-water fish, or to any person who has a written permission from some such proprietor or person entitled to fish as aforesaid.

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Now, of course in libelling under this clause of the Act of Parliament, it is quite necessary that the prosecutor should negative these exceptions—should well allege that they do not apply to or comprehend the defender. And, accordingly, the first thing to ascertain, in examining this libel, is, whether the prosecutor has complied with that necessary condition of relevancy. He has alleged that ‘ the said Peter Dempster is not the ‘ proprietor of the land through or by which the said ‘ water and river of Deveron flows at Pitscurry afore- ‘ said, and he has no right there to fish for trout or other ‘ fresh-water fish ; nor had he a written permission from ‘ the proprietor or person entitled to fish there for trout ‘ or other fresh-water fish with any net of any kind or ‘ description.’

The Court are of opinion that, in so far as regards this part of the libel, it relevantly and well negatives the exceptions ; because we read the Act of Parliament as applying exclusively to the matter of net-fishing. And, therefore, in speaking of proprietors and persons having right, it speaks of proprietors as persons who, from the very nature of their right as owners of the adjacent soil, have a right to fish in any way they please, including fishing with the net. In the same way, in speaking of a person as having a right to fish, who is not proprietor of the land, the statute must be held to speak in the same sense of a right to fish with nets. In the third place, it seems to follow as a necessary consequence, that if persons having right in the sense of the statute, means persons having a right to fish with net, then a person having permission from one having such a right must mean a person having permission to fish with net from a person who has a right to fish with net. So far, therefore, the libel is quite relevant.

But then it is said that, in a previous part of the libel, it is distinctly disclosed that the defender here is the agricultural tenant of the land by or through which the

stream flows in which he is alleged to have fished with a net. The statement is this: that he is farmer in Pitscurry—that is, the land through or by which the stream flows—and that the Duke of Richmond is proprietor, and consequently is his landlord in that farm. Now, it is perhaps somewhat a matter of inference from the words of the libel, that this man is purely an agricultural tenant; but, as the case was argued before us upon that footing, we are disposed to take it as raising that question distinctly and purely, whether the statement upon the face of the libel, that the defender is the agricultural tenant of the land by or through which the stream flows, is fatal to the relevancy of the libel, or practically contradicts that which is alleged in the libel, namely, that he is not within any of the exceptions of the Statute. We are of opinion that an agricultural tenant has not, as such, any right to fish in a stream running by or through his farm, with any net of any kind or description. And being of that opinion, we think it quite unnecessary to go further for ground of judgment. Whether an agricultural tenant, as such, may have right to angle or not, or to fish in any other way for fresh-water fish, is not *hujus loci*, because the Statute deals entirely with net-fishing, and contemplates no other kind of fishing. And, therefore, our ground of judgment is that an agricultural tenant, as such, has no right to fish any stream passing by or through his farm with any net of any kind or description. The result is, that the Court will recal the interlocutor of the Sheriff-substitute, and remit to him to proceed with this complaint.

CLARK, for the appellant, moved for expenses.

The LORD JUSTICE-CLERK.—The Court think, that as this complaint was brought to try a general question, there should be no expenses.

The Court pronounced this interlocutor:—

‘14th January 1861.—Sustain the appeal: Reverse the judgment complained of: Remit to the Sheriff to

No. 8. ' find the complaint relevant ; and thereafter to proceed
 Duke of ' in the cause as accords of law : Find no expenses due
 Richmond v. ' to either party.'
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 Jan. 14. GIBSON-CRAIG, DALZIEL AND BRODIE, W.S.—HAGART AND STEIN, W.S.—Agents.
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Present,

THE LORD JUSTICE-CLERK.

March 18.
 1861.

LORDS COWAN, DEAS, ARDMILLAN, AND NEAVES.

ANGUS M'PHAIL, Suspender—*W. M. Thomson—J. C. Smith.*

AGAINST

JOHN CAMPBELL, Respondent—*A. R. Clark.*

SUSPENSION—APPEAL—JURISDICTION—STATUTES 9TH GEO. IV., c. 39, AND 7TH AND 8TH VICT., c. 35 (Salmon-Fisheries).—A suspension of a summary conviction under the Statutes 9th Geo. IV., c. 39, and 7th and 8th Vict., c. 35, refused, in respect that the suspender had neglected to avail himself of the remedy pointed out by the Statutes, viz., appeal to the next Circuit Court of Justiciary—the Court holding that the objections to the conviction were such as could competently be stated only at the Circuit Court.

No. 4. THIS was a suspension of a conviction and sentence
 M'Phail v. in a prosecution under the Statutes 9th Geo. IV., c. 39,
 Campbell. and 7th and 8th Vict., c. 95, passed for the preservation
 High Court. of salmon fisheries in Scotland. The prosecution pro-
 March 18. ceeded on a petition and complaint to the Sheriff of
 1861. Argyll, at the instance of the respondent, John Camp-
 Suspension. bell of Possil, with consent and concurrence of Henry
 Nisbet, writer in Tobermory, Procurator-fiscal of Court
 for the public interest.

The petition narrated the 3d and 9th sections of the act of Geo. IV., and the 1st section of the statute of

Victoria. It then set forth that the suspender Angus M'Phail and three others named in the complaint, 'did,
' all and each, or one or more of them, early on the morn-
' ing of the 23d day of June 1860 years, or about that

No 4.
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¹ The Act 9th Geo. IV., c. 39, provides (sect. 3)—'That if any person shall, after the expiration of two months from and after the passing of this Act, trespass in any ground enclosed or unenclosed, or in or upon any river, stream, water-course or estuary, with intent to kill salmon, grilse, sea-trout, or other fish of the salmon kind, such person shall forfeit, and pay any sum not less than ten shillings, and not exceeding five pounds.'

The Act 7th and 8th Vict., c. 95, sect. 1, narrates that doubts were entertained whether the provisions of the preceding act were applicable to the sea or sea-shore, and provides—'That if any person, not having a legal right or permission from the proprietor of the salmon-fishery, shall, from and after the passing of this Act, wilfully take, fish for, or attempt to take, or aid or assist in taking, fishing for, or attempting to take in or from any river, stream, lake, water, estuary, firth, sea, loch, creek, bay, or shore of the sea, or in or upon any part of the sea, within one mile of low water mark in Scotland, any salmon, grilse, sea-trout, whiting, or other fish of the salmon kind, such person shall forfeit and pay a sum not less than ten shillings, and not exceeding five pounds, for each and every such offence, and shall, if the Sheriff or Justices shall think proper, over and above, forfeit each and every fish so taken, and each and every boat, boat-tackle, net, or other engine used, in taking, fishing for, or attempting to take fish as aforesaid.'

In regard to the enforcement of penalties under these Acts, the Statute 9th Geo. IV., c. 39, provides (sect. 9)—'That each and every penalty provided by this Act shall go to the informer, and may and shall be recoverable, with expenses, as well before the Sheriff as before the Justices of the Peace of any county as aforesaid, wherein the same may be incurred, or where the offender shall reside, at the instance of any person or persons, who shall prosecute for the same; and in prosecutions for the different penalties imposed by this Act, or any other Act, for the preservation of the salmon-fisheries in Scotland, it shall be lawful for the Sheriff or Justices, before whom any complaint for the recovery thereof may be brought, to proceed in a summary way, and to grant warrant for bringing the parties complained upon immediately before them, and on proof on oath, by one or more credible witnesses, or confession of the offence, or other legal evidence, forthwith to determine and give judgment in such complaint, without any written pleadings or record of evidence, and to grant warrant

No. 4. ' time, wilfully take, fish for, or did attempt to take, or
 M'Phail v. ' did aid or assist in taking, fishing for, or attempting
 Campbell. ' to take, in or from Lochspelvie, near the mouth of the
 High Court. ' River Lussa, or in or from the mouth of the river
 March 18. ' Lussa, which falls into the sea at Lochspelvie, or
 1861. ' in or from the confluence of the said River Lussa
 Suspension. ' with the sea, all situated in the united parish of Pen-
 ' nygown and Torosay, and shire of Argyll, salmon,
 ' grilse, sea-trout, whitling, or other fish of the salmon
 ' kind, without having a legal right or permission from
 ' the proprietor of the salmon fishery, and that by means
 ' of a scringe, or draught, or other net or engine, and
 ' an open skiff or fishing-boat, and have all thereby be-
 ' come liable to the complainer in a sum not less than
 ' ten shillings, and not exceeding five pounds ; and
 ' ought to forfeit each and every fish so taken, together
 ' with the said nets, or other engine, boat, or boat-
 ' tackle so used.'

Warrant was craved to bring the persons complained upon immediately before the Sheriff, that he might forthwith determine and give judgment in the complaint, and thereafter grant warrant for recovery of the penalties and expenses, by poinding and imprisonment. The complaint was signed—' Henry Nisbet, Pro^r. for ' Pet^r.—Concurrence granted—Henry Nisbet, P.F.'

The persons accused were brought before the Sheriff-substitute (Robertson), on the 30th June 1860, and after setting forth that the parties had appeared and that witnesses had been examined, the record bears—

' The Sheriff-substitute finds the complaint proved. Therefore finds
 ' Duncan M'Tavish, Angus M'Phail, Alexander M'Kinnon, and
 ' Alexander MacRae, the parties complained on, severally liable in
 ' the modified penalty of one pound five shillings sterling each, together

' for the recovery of all penalties and expenses decerned for, failing
 ' payment within fourteen days after conviction, by poinding and im-
 ' prisonment, for a period at the discretion of the Sheriff or Justices,
 ' not exceeding six months—it being hereby provided that a record
 ' shall be preserved of the charge and of the judgment pronounced.'

' with one pound one shilling Sterling each of expenses, and decerns
 ' and convicts accordingly ; and failing payment within fourteen days
 ' after this, the date of conviction, grants warrant for recovering the said
 ' sums by poinding, in common form, also to apprehend and commit
 ' the said named parties to the prison of Inverary, therein to be de-
 ' tained for the period of twenty days, unless the said several sums be
 ' sooner paid or recovered respectively ; and in respect that this is the
 ' first time the parties have been brought up on a charge of contraven-
 ' ing the Act, and although they have become liable in the forfeiture
 ' of the boat, nets, and fish detained, in consideration of the circum-
 ' stance above stated, the Sheriff-substitute orders the boats and nets
 ' to be delivered to the parties, but not the fish, which forfeits, and ap-
 ' points to be distributed to the poor in the neighbourhood of Kin-
 ' lochspelvie, if possible, if not, orders it to be destroyed.'

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No proceedings were taken to enforce this sentence until after the autumn Circuit Court of Justiciary for the district had been held. The suspender was apprehended at Oban on the 24th September, and was imprisoned at Inverary some days afterwards.

The note of suspension was presented on 10th October 1860.

The respondent pleaded that the suspension was incompetent, in respect that, under section 9 of the statute of George IV., set forth in the complaint, appeal should have been taken to the Circuit Court.¹

The Court, before further answer, appointed the sus-

' ' Any person or persons who shall think himself, herself, or
 ' themselves, aggrieved by any judgment of any Sheriff or Jus-
 ' tices, pronounced in any case arising under this Act, or by assess-
 ' ment made under this Act, in Scotland may appeal to the Commis-
 ' sioners of Justiciary, at their next Circuit Court, or where there are
 ' no Circuit Courts, to the High Court of Justiciary at Edinburgh, in
 ' the manner, and by and under the rules, limitations, conditions, and
 ' restrictions contained in the Act passed in the 20th year of the reign
 ' of King George the Second, for taking away and abolishing the he-
 ' ritable jurisdictions in Scotland; . . . and it shall not be com-
 ' petent to appeal from, or bring the judgments of any Justices or She-
 ' riff, acting under this Act, under review, by advocacy or suspen-
 ' sion, or by reduction, or in any other way than as hereinbefore pro-
 ' vided.'

- No. 1. pender to lodge a note of the objections to the proceed-
 M'Phail v. ings. These were stated as follows:
 Campbell.
- High Court. ' 1. The instance of the complaint is defective, in re-
 Mar. 18, spect that no interest to prosecute is set forth, and that
 1861. ' the complaint is not signed.
- Suspension. ' 2. It was essential to the relevancy and competency
 ' of the complaint, that the name of the proprietor of the
 ' fishings in question should have been therein set forth.
 ' 3. The illegal fishing charged against the suspender
 ' not being alleged to have taken place within one mile
 ' of low water mark, the complaint was not within the
 ' statutes founded on, and no statutory conviction could
 ' legally follow thereon.
 ' 4. The alternative charges made against the com-
 ' plainer which are not relevantly or specifically set forth,
 ' did not enable him to prepare a defence ; and the gene-
 ' ral finding that the complaint was proved, being a
 ' finding upon these alternative charges, is inept.
 ' 5. Finding the complaint proved does not exclude
 ' the possibility of the complainer's innocence, having in
 ' view the terms of the complaint, wherein one or more
 ' of four individuals were charged with illegal fishing ;
 ' and the judgment ought therefore to be quashed.
 ' 6. It was incompetent to combine in the same sen-
 ' tence the imposition of the penalties—the warrant for
 ' recovering the same with expenses—and the warrant
 ' for apprehending and imprisoning the complainer.
 ' 7. The sentence complained of is farther objection-
 ' able, in respect it bears no date, and also, in respect
 ' that it does not specify to whom the penalties and
 ' expenses are to be paid, of which the complainer was
 ' necessarily ignorant, as no copy of the complaint was
 ' ever served on him.'

(1. 2). In support of the first and second of these ob-
 jections, the suspender contended that the instance was
 insufficient. The interest of Mr Campbell of Possil,
 either as proprietor, or as common informer, ought to
 have been set forth.

THE LORD JUSTICE-CLERK.—I never saw the instance of a common informer set forth even in prosecutions under the Night Poaching Act, and it will be very difficult to persuade the Court that that is necessary or proper here.

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THOMSON, for the suspender,—referred to *Herbert v. Duke of Roxburghe*, High Court, Dec. 26, 1855, Irvine, vol. ii. p. 346.

LORD COWAN.—I delivered the judgment of the Court in that case, and the question of common informer was not involved in it.

(3). In support of the third objection, the suspender contended that the words in the second section of the Act of Victoria founded on in the petition, 'within one mile of low water,' must be read as applying, not merely to the clause immediately preceding it as to fishing in the sea, but must be held also to apply to the clause as to fishing in any estuary, frith, sea, loch, or creek. The confluence of the Lussa and Loch Spelvie might be more than two miles broad, and in that case, to fish in the middle would not be a contravention of the statute. It was further contended, that the complaint described Loch Spelvie as being 'in the sea.'

THE LORD JUSTICE-CLERK.—This is an objection to description which surely ought to have been taken *in initio litis*. If the Court of Session were to deal as strictly with summonses as you propose that Justices of the Peace should deal with them, the greater part of them would be thrown out.

LORD COWAN.—If the *locus* had been clearly out of the statute, the case would have been different.

(4). In support of the fourth objection, the suspender argued, that the conviction was too general. The complaint charged alternatively taking, or attempting to take fish. Of which of these was the suspender found guilty? The doing of an act, and the attempting to do that act, were perfectly distinct things, and were always so regarded by the Court of Justiciary. Had a

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Jury returned a verdict in such terms, no sentence could have followed on it, as the Judge could not have known whether to punish for the greater or for the less offence. A general conviction on an alternative charge had often been suspended by the Court of Justiciary. *Jones and M^r Ewan v. Mitchell*, High Court, Dec. 23, 1853, Irvine, vol. i. p. 334.

The LORD JUSTICE-CLERK.—In that case, the two offences were quite different in their nature.

The respondent referred also to *M^r Nab v. Glass*, High Court, Jan. 22, 1842, Broun, vol. i. p. 41; *Mains and M^r Lullich v. Fraser*, High Court, Feb. 6, 1860, Irvine, vol. iii. p. 533.

The LORD JUSTICE-CLERK.—One of the alternatives in the last quoted case was bad. The question is, if there be any difference between the alternatives. There can be no greater difference between them, than that the one is under the statute, and the other not. But is there any such real distinction in the present case?

(5). In support of the fifth objection, the suspender argued, the conviction was bad, in respect that it did not state whether one or more of the accused were convicted. In the case of *Sharp v. Dykes*, High Court, Feb. 18, 1843, Broun, vol. i. p. 521, a conviction was found bad, which found that the accused had endeavoured to force from their work two persons 'or one or other of them.' *A fortiori*, must there be certainty as to the person convicted.

(6). On the sixth objection, the suspender argued, that there was no authority to imprison, except in default of payment; and until that default was established, the magistrate had no jurisdiction. *Reid v. Lang*, Court of Session, Jan. 13, 1859, 21 D. B. M. 1298—a case under the Public Houses Act—*Lamond v. Baker*, Court of Session, Feb. 9, 1860, 22 D. B. M. 718. These cases establish the principle that no warrant can be granted until the time of payment elapses.

The LORD JUSTICE-CLERK.—The question turns entirely

on the reading of the statute. There are some statutes that plainly intend that the two things shall be separate; but the question is, does not this statute clearly contemplate their being one?

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(7). Lastly, the suspender contended, in support of the 7th objection, that it was not enough to have the beginning of the record dated. The sentence should have borne a date, and it ought also to have specified to whom the penalty was to be paid.

Suspension.

LORD DEAS.—Whatever may be the force of these objections, could you not have taken all of them to the Circuit Court?

THOMSON, for the suspender.—We have been deprived of our right to appeal to the Circuit Court, by the respondent not having enforced the sentence till just at or after the Circuit, and thereby leading us to believe that he had abandoned the sentence. Further, if the objections were good, they went to this, that there was no judgment, and the suspender had been imprisoned without warrant, and, therefore, any thing which he had omitted to do, could not form a bar to his complaining of the inferior Court having acted illegally.

The counsel for the respondent was not called on to reply.

LORD COWAN.—It is not necessary to hear a reply in this case. There is only one point raised upon which, had it been necessary to go into it, I should have liked to have heard more, and that is the general question (as to which, speaking from memory, I do not think there is much authority), how far a party, who has not followed the mode granted to him by the statute, can seek a remedy elsewhere. The 9th section of the statute declares that an appeal is competent to the next ensuing Circuit Court. Now a Circuit Court occurred after the date of this sentence, which was pronounced upon the 18th of June. According to the statute, therefore, the appeal should have been to the Autumn Circuit Court. An appeal was either not entered, or not insisted in.

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The suspender's explanation was, that the judgment was not enforced till about the circuit time. That would only have given him the more time to appeal, and I am not surprised that this sentence should not have been put in force till after the time for appealing had expired. As regards the proper grounds of review, I only wish to say that, whatever view I might have taken of them in judgment, I hold this sentence to have become final, and that I cannot now consider them. That it may be open to review for objections that go fundamentally to the validity of the sentence, I do not mean to deny. If there were a radical defect, or a clear excess of jurisdiction, I do not mean to say that there might not be room for a suspension and liberation. But there is nothing in the grounds of objection which have been stated which can properly fall under that description. We are, therefore, not called upon to consider farther the grounds stated ; but I may say, that had they been brought before me as Judge of the Circuit Court at Inverary, I should have repelled them all.

LORD DEAS.—I am of the same opinion. The only objections now insisted in,—the 3d, 4th, 6th, and 7th,—are all objections which should have been taken to the Circuit Court ; and farther, they are all bad upon their merits. Beyond making these two observations, I do not think it necessary to say any thing.

LORD ARDMILLAN.—I am of the same opinion. I do not mean to say that the High Court of Justiciary could not interfere in the case of a clear nullity appearing *ex facie* of the proceedings ; or, that if a case of clear illegality or oppression were shown, the party would be precluded from appealing. But I say that all the grounds here stated are of such a kind, that they should have been stated to the Circuit, and I can see no good reason why they should not have gone there. I fully concur in thinking that they are all bad.

LORD NEAVES.—With one reservation, I agree upon both the points that have been stated as to the incom-

petency of our entertaining these objections, and as to being satisfied that they are bad.

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A very liberal review is allowed to the Circuit Court, and I quite agree that these objections ought to have gone there. But I have some difficulty in resting the matter wholly on that point. For should it be made to appear to me that a person was in prison on a warrant, which, as a warrant, was entirely illegal on the face of it, I should hesitate to say that we were not bound to liberate him, as not being properly in jail. But whatever the rule may be at common law in the case of a sentence of imprisonment for failure to pay a fine, there can be nothing so illegal in issuing the warrant for imprisonment at the time the fine is imposed, to be operative conditionally upon non-payment, that a statute cannot make it legal. The statute seems clearly to have authorised the form of process followed.

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The LORD JUSTICE-CLERK.—The statute permits any person who is aggrieved by being convicted under it, to appeal to the next Circuit Court, without any limitation or restriction of the grounds of appeal, except this, that as there is no provision for a record of the evidence, there can be no review on the ground of the sentence being contrary to evidence. That is the only limit.

It follows, then, that a person may appeal, not only on the merits, but on any ground which is good in law to set aside the conviction—relevancy or competency, or want of jurisdiction in the Judge—all these will be good grounds of appeal. Now, it is quite true that there may thus be grounds of appeal to this Court, which may be sustained after a Circuit Court has elapsed, and the statutory remedy has been forfeited; but the only grounds of that kind which I recognise, are those which involve excess of jurisdiction, and those which emerge after the Circuit Court has been held, as, for instance, if, after the Circuit Court has been held, a person has been imprisoned in a place which was not a legal prison. All other objections are proper for the Circuit Court, and

No. 4. *for it only. If a person imprisoned on a warrant*
M'Phail v. *which is open to any objections of the latter class,*
Campbell.
 High Court. *were to present a note of liberation, if he could have*
 Mar. 18. *availed himself of the statutory remedy, and could have*
 1861. *gone to the Circuit Court, I should hold him precluded*
 Suspension. *from coming here. In the present case, I think that all*
the objections that have been stated are of the class which
can be stated only at the Circuit Court, and I agree
with your Lordships in thinking, that as the complainer
had the opportunity of availing himself of the review
provided by the statute, and has neglected it, the note
of suspension must be refused.

The note of suspension was refused, with expenses.

ALEXANDER MORRISON, S.S.C.—MACLACHLAN, IVORY, & RODGER, W.S.—Agents.

ABERDEEN.

April 30.
1861.

Judge—LORD ARDMILLAN.

HER MAJESTY'S ADVOCATE—*W. Ivory A. D.*

AGAINST

JAMES FARQUHAR—*Skelton.*

JAMES STRACHAN—*Fordyce.*

CHARLES SYMON—*Cowan.*

AND

DAVID ESSON—*Rettie.*

No. 5. *MOBBING AND RIOTING—ASSAULT—INDICTMENT—RELEVANCY.—Ob-*
James Far- *jection to the relevancy of an indictment charging Mobbing and*
quhar and *Rioting, as also Assault, repelled.*
Others.

Aberdeen. *Four panels charged with mobbing and rioting on the occasion of a*
 April 30. *county election, but acquitted.*
 1861.

Mobbing *JAMES FARQUHAR, JAMES STRACHAN, CHARLES SYMON,*
and Riot- *and DAVID ESSON, were indicted and accused,—*
ing, as also,
Assault.

THAT ALBERT, by the laws of this and of every other well-governed realm, Mobbing and Rioting ; As also Assault, especially when committed to the serious injury of the person, and by a person who has been previously convicted of assault, are crimes of an heinous nature and severely punishable : YET TRUE IT IS AND OF VERITY, that you the said James Farquhar and James Strachan are, both and each or one or other of you, guilty of the said crime of mobbing and rioting, and of the said crime of assault, aggravated as aforesaid, or of one or other of the said crimes, actors or actor, or art and part ; and you the said Charles Symon and David Esson are, both and each or one or other of you, guilty of the said crime of mobbing and rioting, and of the said crime of assault, aggravated by being committed to the serious injury of the person, or of one or other of the said crimes, actors or actor, or art and part : IN SO FAR AS on the 15th day of February 1861, or on one or other of the days of that month, or of January immediately preceding, or of March immediately following, being the polling day appointed for taking the votes of the electors of the county of Aberdeen for the election of a member of the Commons House of Parliament for the said county, a mob of riotous and evil-disposed persons, of which you the said James Farquhar, James Strachan, Charles Symon and David Esson, all and each or one or more of you, formed a part, did wickedly and feloniously, assemble at or near the Court-House situated in or near the Square, in or near Huntly aforesaid, and then used as a polling-place ; as also in or near the said Square ; as also in or near Duke Street and Bogie Street, both of Huntly aforesaid, or in or near one or more of the places above libelled, for the unlawful purpose of assaulting, maltreating, or intimidating various electors of the said county, and other peaceably disposed persons, then in or near the places above libelled, or one or more of said places, or for some other unlawful purpose to the prosecutor unknown ; and the said mob, or great number of riotous and evil-disposed persons, time above libelled and places above libelled, or in or near one or more of said places, did, wickedly and feloniously, conduct themselves in a riotous, tumultuous, and disorderly manner, to the disturbance of the public peace, and the terror and alarm of the lieges, and did assault and maltreat various electors of the said county, and other peaceably disposed persons, and severely injure them, or one or more of them, in their persons, and put them into a state of terror and alarm, and did attack the said Court-House, and the inn or premises situated in or near Bogie Street aforesaid, then and now or lately occupied by Alexander Grant, innkeeper, then and now or lately residing there, and did throw stones and other missiles at the windows of the said Court-House and inn or premises, and did break various panes of glass of the said windows : IN PARTICULAR, time above libelled, and at or near the said Court-House, and in or near the Square aforesaid, or one or other of them, the said mob, or great number of

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riotous and evil-disposed persons did, wickedly and feloniously, and in a riotous and tumultuous manner, and to the disturbance of the public peace, attack and assault William Leslie, then and now or lately residing at or near Wart Hill, in the parish of Rayne, and shire aforesaid; George M'Pherson, now or lately factor for the Duke of Richmond, and then and now or lately residing at Gibstone, in the parish of Huntly and shire of Aberdeen; George Porter, senior, farmer, then and now or lately residing at or near Newton Cairney, in the parish of Cairney, and shire aforesaid; George Cooper, farmer, then and now or lately residing at or near Wraes, in the parish of Kennethmont, and shire aforesaid; George Gray, farmer, then and now or lately residing at or near Midplough, in the parish of Huntly aforesaid; and James Cran, farmer, then and now or lately residing at or near Newseat, in the parish of Rhynie, and shire aforesaid, all and each or one or more of them electors of the said county, and did with sticks, stones, and other missiles, pelt or strike the said William Leslie, George M'Pherson, George Porter, senior, George Cooper, George Gray, and James Cran, or one or more of them, on or near the head and face, and other parts of their persons, and seize hold of them, and did violently push and pull them about, and jostle them, and did violently obstruct them, and prevent them from leaving the said Court-House, and did otherwise maltreat and abuse them; and the said mob or great number of riotous and evil-disposed persons did also, time above libelled, wickedly and feloniously, and in a riotous and tumultuous manner, and to the disturbance of the public peace, attack the said Court-House, and did shut up or secure a door or gate thereof, or leading into the back court or yard thereof, and did throw stones and other missiles at the windows of the said Court-House, and did break seventeen, or thereby, panes of glass of the said windows; and the said mob or great number of riotous and evil-disposed persons did also, time above libelled, wickedly and feloniously, and in a riotous and tumultuous manner, and to the disturbance of the public peace, attack the said inn or premises in or near Bogie Street aforesaid, then and now or lately occupied by the said Alexander Grant, and did throw stones or other missiles at the windows thereof, and did break twenty-two, or thereby, panes of glass of the said windows; and the said mob or great number of riotous and evil-disposed persons did also, time above libelled, at or near the said Court-House, and in or near the Square and Duke Street and Bogie Street aforesaid, or in or near one or more of said places, wickedly and feloniously, and in a riotous and tumultuous manner, and to the disturbance of the public peace, attack and assault James Duthie, then and now or lately lieutenant of the City of Aberdeen Police; Charles Reid and James Milne, both then and now or lately sergeants in the said City of Aberdeen Police; John Webster, William Hall, William Walker, William Smart, James Watt, Sa-

muel Pressly, William Ritchie, Alexander Begg, James Allardyce, Jonathan Symmers, James Anderson, Daniel Ross, William M'Donald, and John Masson, all and each or one or more of them, then and now or lately constables in the said City of Aberdeen Police; James Cran, then and now or lately superintendent of the Aberdeenshire County Police; George M'Gregor, then and now or lately, inspector of the said Aberdeenshire County Police; and William Wight, Alexander Ingram, Donald Findlay, James Dow, William M'Hardy, James Tarves, Kenneth M'Leod, Lewis Cameron, Alexander Bannerman Milne, Charles Omas Mascall, and Peter M'Leod, all and each or one or more of them then and now or lately constables of the said Aberdeenshire County Police, or one or more of the said officers and constables of the said City and County Police, who were then and there lawfully engaged in the execution of their duty in endeavouring to preserve order and the public peace, and to put a stop to the aforesaid riotous and illegal proceedings, and did surround and press against them, and did with their fists strike them, and did, with stones and sticks, or other missiles and weapons, pelt and strike them, or one or more of them, on the head, shoulders, breast, and back, and other parts of their persons, and did otherwise maltreat and abuse them; by all which, or part thereof, the said Charles Reid, Jonathan Symmers, and Charles Omas Mascall, were, all and each or one or more of them, wounded to the serious injury of their persons; and all this, or part thereof, the said mob, or great number of riotous and evil-disposed persons did in execution of the unlawful purpose above libelled, or in execution of some other unlawful purpose to the prosecutor unknown, for which they were assembled as aforesaid; and you the said James Farquhar, James Strachan, Charles Symon, and David Esson did, all and each, or one or more of you, form part of the said mob or great number of riotous and evil-disposed persons, and were all and each or one or more of you present, and actively engaged with, and did excite, encourage, aid, and abet the said mob or great number of riotous and evil-disposed persons in the said unlawful acts of mobbing and rioting and assault above libelled, or part thereof: And you the said James Farquhar and James Strachan have each of you been previously convicted of assault.

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SKELTON, for the panel Farquhar, objected to the relevancy of the indictment, in so far as it charged the crime of assault, aggravated by previous conviction, in respect that there was no statement in the minor proposition applicable to the assault.

LORD ARDMILLAN said,—His brother Lord Cowan concurred with him, that there was no charge of assault

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here, unless the charge of mobbing and rioting was made out. The case put was, that there was a mob of riotous and evil disposed persons; that that mob committed assaults; that the prisoners were present, concurring in its proceedings, and therefore guilty of assault. If there was no riot, there could be no assault; but that depended on the evidence in the course of the trial.

The Court repelled the objection, and found the libel relevant.

The panels pleaded Not Guilty.

EVIDENCE FOR THE PROSECUTION.

WILLIAM DANIEL, *Sheriff-Clerk depute of Aberdeenshire*,—proved the declaration.

Cross-examined for panels.—‘Joined the mob,’ was an expression put to all the panels, and answered affirmatively. [The declaration was now admitted, subject to explanations given by last witness.]

GEORGE MACGREGOR, *Police Inspector*.—I live at Huntly: I have been there on duty nine years. I remember the 15th February last. It was the polling day in the county. I was on duty at the court-house, a polling station, in the square of Huntly. There is a back entrance to the court-house, leading down to Duke Street and Bogie Street. The court-house is the first floor up stairs. It is about four yards from the door of the court-house to where carriages stop. I attended on the 15th, and was there before eight o’clock. Ten men of the police, Wright, Ingram, Finlay, Dow, M’Hardy, and others, were there. Polling commenced at eight. About ten o’clock I went out of the court-house. I saw young men and boys throwing things at persons going to vote; snow-balls and oranges. There was a crowd,—about 1000 perhaps. They seemed excited, crying ‘Pelt the Tories.’ A cry ran through the crowd of this, and they were hissing, and making a great noise. I went for the Duke of Richmond’s factor, and brought him to the square. As he got out of the omnibus, and went in, a shower of snow-balls and oranges was thrown after him. I went into the court-house, and found Mr Leslie, M. P. there. It was ‘some time past 10 A. M.’ then. I saw the gate at the back shut up between eleven and twelve. It was nailed up from the inside of the court-yard, which could be reached by another gate. Large trees were put up against this gate on the outside. This gate was secure. I heard cries, ‘Send out the Tory factor,’ and ‘the Tory laird.’ I saw Mr Cooper, farmer, Wraes, going from the court-house after voting: he was pelted with snow-balls; I rescued him. M’Pherson

(factor) asked me to convey Cran away. He was pelted with snow-balls and oranges; no eggs that I saw. Cran ran, and I returned. I saw Mr Leslie try to get out after that. I saw the panel Farquhar at 'the Gordon Arms,' the hotel of both parties. I saw Farquhar, who hissed and swore at me. I did not see him throw any thing. I can't say I saw the other prisoners there; but I saw Symon there when Mr Leslie was getting away. He pretended to assist me, but he prevented me from opening the door of the carriage. Mr M'Pherson and Mr Leslie did not get away; there was a dreadful throwing of something. The crowd pushed and carried me about. There was a great noise as the Tory voters were going out. The Sheriff and Fiscal came about four. Then an attempt was made to get Mr Leslie out; but he did not get out; things were thrown at that time the same as before. I saw no stones. The city police had come. They came down in a body; then another attempt was made to get Mr Leslie into the carriage. He got through the crowd and double line of police to the carriage, the 'throwing' the same as before, and he got away. Mr Stewart, a Justice of Peace, was there: he is a liberal; he tried to help Mr Leslie. Mr Lawson also assisted. I got some blows, one with a stone on the forehead: it was cut through the hat, and my forehead bled. I saw Farquhar at the back part of the court-house, and afterwards, about four o'clock, he came out of the crowd, and tried to get hold of me, but he did not get hold of me. I met Symon, who laid hold of me, and tried to drag me out of the line of police, and swore at me, and said I had struck him. He took hold of me another time, and accused me of striking him. I saw Strachan one time in court, and saw him throwing oranges and snow-balls. I saw Esson there several times, and did not see him doing any thing; this all in the square. After Mr Leslie got away, seventeen panes of glass were broken by the crowd. I went then with the police to the station,—about thirty men in all,—we went towards the railway station. Then, as we left the court-house, we were attacked with sticks and stones; some large ones; several were struck. I was struck on the foot. We halted and charged back, then proceeded again, and were again stoned. Two policemen, Wright and Mascall, were struck. After the second charge, Finlay was hurt, and had to leave. The crowd did not follow past Bogie bridge. There were panes of glass at Grant's inn, Bogie Street, broken. I did not see any of the prisoners doing any thing at that time. I did not see them at all then.

Cross-examined for the panel Farquhar.—By "missiles" I mean snowballs and oranges. There are a few steps of outside stair; then an inside stair, about six steps of outer stair. A wooden stair goes inside up to the Court-House. I said about 1000 was the number. I think so. The population of Huntly is 3000 or 4000. Mr M'Pherson is well liked by respectable parties. There is the Duke of Richmond's Hall, different from the Court-Hall. Mr Leslie held his meetings in

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the Court-House. I saw the state of the door at the back of the Court-House, the sticks were visible above the door. A notice of the poll was put up at its close. I was never at Huntly on an election-day. I did not say to Farquhar, 'I'll mark you for that.' There was a door at the side of the court-house yard. I did not then say to Farquhar, 'I'll mark you.' The gate was broken up after the Sheriff came. I saw no stones till after we left the court-house.

Cross-examined for the panel Strachan.—I saw Strachan with snow-balls and oranges in his hand, watching for Tories, and throwing occasionally. I spoke to him. I saw him last when the Sheriff came. I saw him throwing many times.

Cross-examined for the panel Symon.—Panel said he was a pensioner, bound to assist me, and he would not be obstructed. This was between 12 and 1, not 2 o'clock. I had not struck him. I did not, I can swear to it, for I know the man. Panel had an injury on his head when he took hold of me. I saw it. All was over by about 6 o'clock. I saw the crowd pelting voters before and after they voted. When Mr Leslie went away, I did not see who was taking charge of him.

WILLIAM LESLIE, M.P.—I was a candidate for the county, and voted at Huntly about $\frac{1}{2}$ past 10. I went into the court-house by the back entrance. It was open, and I came out by the same way in about ten minutes. I found the gate then nailed up. The police-constable tried to remove the gate. The court was immediately filled. One lad came up as if to throw a snowball at me. I told him to desist. I turned into the court-room, snow and slush were thrown at me. I saw from the windows of the court-house a riotous crowd in the square, making a great noise, and pelting voters. I was prevented from going by the 11 $\frac{1}{2}$ train. I tried, with Mr M'Pherson, to catch the 1 o'clock train. M'Pherson went down the steps, and was showered at with missiles. M'Pherson got away. I was prevented from getting into the omnibus. I returned to the court-house. The Sheriff came about 4. He and Mr Stewart and Mr Lawson tried to get me away. They offered to escort me. It was considered I was safe under their care—the Sheriff advised me to go. I was swept away by the crowd like a wave. Missiles were thrown at that time. I was struck by one stone and some snow-balls. I had seen boys gathering stones. I remonstrated with the Sheriff, and a larger force of police was got. The crowd was then much excited; they were breaking the windows of the court-house. I got away through the line of police into the omnibus. I got a blow with something hard. Stones were thrown through the windows of the omnibus as large as my fist. I did not go to the station, but I got out of the town, the crowd yelling and throwing. I was a stranger in Huntley.

Cross-examined for the panel Farquhar.—I went to vote for myself, it is common. I found out I was the unpopular candidate at

Huntly. No missile was thrown at me before the policeman advised me to return; but as I turned the missiles were thrown at me. It was on returning to the court-house, and after seeing the crowd, that I telegraphed for the police. George Mackie is an elector in Huntly. I saw him. He said I might make another attempt to go out by the back-door. I think he offered to go with me. I said I would not go. I would go out, dead or alive, by the front door. I thought the crowd had an animus against me. I can't say what the crowd said. I had no cuts and no injuries. Nothing I felt next day. The snow-balls, oranges, and slush were the principal missiles. M'Pherson was with me on one occasion that I tried to get out. I think the numbers were 69 to 60.

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ing, as also,
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Re-examined for the Prosecution.—I was kept at Huntly from a quarter past 10 to near 5.

Cross-examined for the panel Strachan.—I thought the crowd were acting together. Greater part of the polling was over about 12 o'clock. A few about 2 o'clock.

To the Court.—No Riot Act was read. Stewart and Lawson did not seem to have much influence with the crowd.

GEORGE M'PHERSON, *Factor for the Duke of Richmond.*—I went to the court-house, and was pelted going in—a perfect shower, but not hurt. I found Mr Leslie in the court-house. I saw George Porter, farmer, with clothes muddy. I was afraid to leave; then we arranged to go together, Porter and I. I went to the carriage—I could not get in. I saw a person inside. I was pelted again. I went back into the court-house. I saw Porter, who seemed exhausted, but he got off. I remained, and I tried to get away with Mr Leslie. I was swept away by the mob past the omnibus, and was much pelted and repeatedly struck. I got into a shop. I was much confused. I had not been in good health. My forehead was slightly bruised and scratched. I saw Dr Wilson in the shop. I saw the panel Strachan as I went into Huntly, and saw him in the square, and then recognised him. I did not see him doing anything.

Cross-examined for the panel Farquhar.—There is a hall of the Duke of Richmond's let as a granary.

GEORGE PORTER.—I polled, and left the court-house about 9. I went back to the court-house between 11 and 12. Milne and I went. I took charge of Milne to vote. Missiles were thrown as we went in. In coming out, I was much pushed and pelted, and was carried round the cab by the crowd. I got one kick, I was squeezed a good deal, and got a blue eye from something that hit my face.

GEORGE COOPER.—I went to vote for Mr Leslie, but I did not vote. I am brother of Mr Leslie's agent, and well known. I left between 1 and 2. The crowd did press on me, and put me down as I was leaving the court-house. I was helped up and got away. My clothes were spoiled with mud.

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Cross-examined.—I did not fall down. I got a little help.

GEORGE GREY, *farmer*.—I was at Huntly at the polling. Before I got in I was cut in the cheek by something hard thrown at me. They said I was a tory, and I suppose I was. Then I voted. In coming out again I was pelted, and my hat knocked off.

JAMES CRAN, *farmer*.—I polled for Mr Leslie. On my way to the poll I was pelted with things—oranges and other things, and my hat knocked off. I got into the court-house about 10. I was near two hours in the court-house. I was afraid to go out, and that was why I remained. As I left I was pelted. I ran for it, and got off.

WILLIAM LAWSON, *leather-merchant, Gordon Street, Huntly*.—I am not a voter. I saw the crowd attacking Cooper. I got the crowd to desist. I also assisted Mr Leslie. Mr Lawson and Alexander Stewart also did so. The first time we were carried away the mob crushed and threw missiles. I got some Volunteers I knew to help me to aid Mr Leslie. I am a Lieutenant of Volunteers. The crowd were attacking the Tory party—the crowd was violent. Towards the end of the day there were several hundreds, perhaps about 500. I can't say I ever saw stones thrown.

Cross-examined.—I cannot speak to the number, but there were people came from the country in the afternoon.

Cross-examined for the panel Symon.—Symon is a pensioner—a peaceable, well-disposed man.

To the Court.—Stewart and Lawson took no part in the election, holding office under the crown.

MARGARET BREBNER.—I take charge of the court-house at Huntly. I cleaned it, and there were stones inside which might fill a shovel—17 panes were broken.

JAMES MINTO, *draper, Huntly*.—I saw panels in Huntly. I can't speak to seeing them doing anything.

ALEXANDER GRANT, *innkeeper, Bogie Street, Huntly*.—On polling-day, a crowd following the police passed. They smashed 28 panes of glass, and 2 mirrors, making a great noise. This was between 4 and 5 o'clock. The crowd were following the police. It was they that broke the windows.

LEWIS CAMERON, *police-constable on duty at Huntly on 15th February*.—I saw the attack on M'Pherson. Panels Farquhar and Symon were there obstructing the voters. Farquhar struck M'Pherson with his hand and with his foot. I pushed him back. I also saw Farquhar throwing something. He was taking an active part. I saw Symon also there, taking an active part when M'Pherson and Porter were attacked. I got blows that day. I saw all the panels in the crowd. I saw Wight struck on the head with a stone. I took him away into a shop.

Cross-examined.—I saw Symon there almost all day. Symon was always in front, about the first who attacked any voter.

JAMES DUTHIE, lieutenant of police.—I went to Huntly with the Sheriff and Fiscal, 14 constables and 2 sergeants. We went to the court-house. In the afternoon we got Mr Leslie out of court-house. The crowd yelled and called 'down with him.' They seemed determined against him. After he got away, I marched the police down to the station. Several police were attacked. Reid's head was cut, and Summer's also. A great many missiles were thrown. I saw bits of branches of trees thrown. There were about 30 police, and they went away in a body. We were pelted a good bit of the way. We turned and charged them, then went on again. Some large stones were thrown. Symmers was worse struck. Superintendent Cran was struck.

To the Court.—After attempting to get Mr Leslie away, I think the mob was dangerous. I saw very few persons disposed to be orderly. It was after that date I thought it an alarming mob. I can't say as to persons coming from the country.

CHARLES REID.—I was cut on the head by a missile; it bled a good deal. I was cut through my hat about 4 o'clock. I was one day off work. I saw Symon and Esson. Esson was jostling in front of the crowd. Symon was also jostling and yelling. After that Symon seized M'Gregor by the arm. That was immediately after I was struck. This was between 4 and 5. I observed a mark of blood on his head.

JONATHAN SYMMERS.—I saw Esson in the crowd using or throwing a stick towards the court.

WATT of the police.—I was struck before that with a stone, and my head was bleeding. I saw Strachan in the crowd in Duke Street, and he was throwing stones. I saw Esson in Duke Street after the second charge by the police.

Cross-examined.—I can't say I have seen Strachan before.

CHARLES MASCALL, police-constable.—I went to Huntly. I was hurt going to the station in Duke Street by a stone on my head, which was much hurt—much cut. I was 10 days off duty.

JAMES CRAN, Superintendent of Police.—I went up to Huntly by train with the Sheriff. I was hurt by a stone in Duke Street, cut through the hat, and wounded me, and another heavy stone on my back. I saw a man throw a stone, and he had stones in his coat. I gripped him, he had a dozen of stones. Farquhar was the man.

Cross-examined.—Webster of the city police was by when I saw Farquhar.

JAMES TARVES, police-constable.—I saw Farquhar throwing at M'Gregor and M'Pherson, and again throwing at Mr Leslie. I saw Strachan throwing repeatedly at M'Pherson, and M'Gregor, and Leslie. I saw Symon by me drag M'Gregor away. I saw Farquhar throw stones twice at the police. Symon, also, two or three times. Saw Esson throw stones at the police—good big ones.

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Cross-examined.—I knew Esson by his uniform.

Re-examined.—That is the man.

WILLIAM WIGHT.—Farquhar threw a stick as Leslie went into the carriage—he was also throwing stones at the police—he struck myself. I saw him often—he appeared excited. I saw Strachan throwing snow-balls and oranges at the Tory voters. I did not see Esson do anything particular. I saw Symon seize M'Gregor. I saw Farquhar in Bogie Street throwing stones, not Strachan, Symon, nor Esson in Bogie Street. I was struck on the back of the head. I was stunned, and my head sore for some days.

JOHN WEBSTER, *police-constable*.—I went down with Lieutenant Duthie. I saw Strachan, Symon, and Esson in the crowd. Strachan was throwing at the police. I did not see Symon throw. I saw Esson throw a stick at the court wall. I saw Cran lay hold of Farquhar in the street, with stones in his coat.

Cross-examined for Symon.—I speak of him when Leslie was going, and after he was gone.

JAMES WATT, *constable*.—I saw Esson throw a staff at me. He first struck at me with it, then threw it at me. On my way to the station, I saw Esson throwing stones at the police. I saw Symon with stones, and throwing them.

Cross-examined for the panel Esson.—It was a staff like a walking-stick that Esson threw at me.

Cross-examined for the panel Symon.—I am sure of the man with the stones in his hand (Symon).

ALEXANDER B. MILNE, *constable*.—I saw Farquhar. He was throwing snow-balls. Esson was throwing something also—he was active. I saw Symon seize M'Gregor on our way to the station. Esson threw stones.

ALEXANDER CHALMERS, *Governor of the Prison*, and JAMES BISSET, *keeper of the court-house, Aberdeen*, proved the convictions for assault.

The prisoners' declarations were then read. They admitted being amongst the mob, but denied having thrown any missiles, or otherwise taking part in the disturbance. None of them were voters.

EXCULPATORY EVIDENCE FOR THE PANEL SYMON.

GEORGE WILSON, *M.D., Huntly*.—Panel Symon called about 5 to have his head dressed.—He had an injury on the head—it had been a hard blow.

GEORGE FIFE, *labourer, Huntly*.—On the polling-day, I saw Symon about 2 o'clock. He sent me with potatoes to his father. I had to seek a hurley. I got it in about 2 hours. Symon and I continued together from 2 till near 5. Panel threw nothing at any one. Panel

at one time was crushed into court, and came out bleeding. Panel went up to M'Gregor, and asked why he had struck him. Symon went to the Fiscal to complain he had been struck. I went home with panel. I took Symon to Dr Wilson's. I left Symon about 6. When the omnibus was at the door, Symon was trying to keep back the crowd, and he said it was his duty to do so.

Cross-examined.—I saw Leslie go into the 'bus. I did not see him before. I saw the throwing of snow-balls—just a few, and very quickly done.

JOHN ASHER.—At Huntly election I saw panel Symon, near the omnibus, anxious to keep back the crowd; he was trying to keep them back. Symon was pushed forward, and he got a blow on the head. I afterwards saw Symon charge M'Gregor with the blow.

ROBERT GIBB.—I live in Huntly. I know Symon, who I saw offer assistance to the police. After that a police-constable struck Symon.

Cross-examined.—I was 8 or 10 yards off from Symon.—He was pressing back the mob in the front. I thought he was trying to keep the crowd back. He is an old soldier, and I saw him endeavouring to keep the people back. Symon challenged M'Gregor for striking him. He did not touch him to harm him.

CHARLES CLARK, *shoemaker, Huntly*.—I saw Symon at the polling-place. I saw him struck by M'Gregor the constable on the back of the head.

Cross-examined.—I have been convicted of theft once, two years ago.

ALEXANDER HENDRY.—I saw Symon at Huntly before Leslie was taken away—he was evidently pressing back the crowd. I saw him struck. The crowd pushed him forward, and M'Gregor struck him with a baton. I am sure of this. Symon wished to complain of this.

Cross-examined.—I have known Symon, and have spoken to him. I have been convicted of assault and fined.

EXCULPATORY EVIDENCE FOR THE PANEL FARQUHAR.

ROBERT SMITH.—I was in the Square most of the day. I saw Farquhar—never doing anything.

Cross-examined.—I saw the crowd abusing some people.

ROBERT LAMB, *flesher, Huntly*.—I saw Farquhar there on the polling-place. I saw some boys near Beattie's Inn throwing oranges. M'Gregor said to Farquhar he would mark him. I saw Farquhar do nothing.

Cross-examined.—I did nothing. I did not strike Tarves—he never told me to be quiet. I was in the crowd from 9 to 1. I did not put my hand into the carriage.

FRANCIS GORDON.—I was at the polling-place, and saw boys throwing oranges and snow. Farquhar and I were looking on. I saw

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No. 5. M'Gregor, who ordered Farquhar home, and said, 'I'll mark you for James Farquhar and ' that, James.' I saw Farquhar doing nothing all day. Others. *Cross-examined.*—The boys were throwing oranges and snow-balls at boys.
Aberdeen. *To the COURT.*—It was for refusing to go home that M'Gregor said April 30. he would mark him. 1861.
Mobbing and Riot- *Examined for the panel Esson.*—Esson was home on furlough. I ing, as also, saw him there on the polling, standing apart from the mob. Assault.

ARCHIBALD DAVIDSON, *Sheriff of Aberdeenshire.*—I got a telegram about 10 minutes past 1 from Mr Leslie. It was that there was a violent riot at Huntly, and that the police there were powerless. I had arranged to be able to send city police, and I went with them to Huntly. I got a short telegram on the way, and I went on to Huntly. I saw the crowd. There seemed to be persons from the country, and I think I heard so. I arrived at 17 minutes to 4.

To the COURT.—No one prevented voting after a little time. I thought the crowd was of a more formidable character. It was arranged that Mr Leslie should be taken away in a carriage of Mr Gordon's party.

For Esson.—John Grant. I am in the Artillery. Esson is in the Artillery. He is here on furlough, so must have a good character.

The Jury were then addressed by the Counsel for the different panels, RETTIE, for the panel Esson, contending that the mob described in the indictment as assembled for the unlawful purpose of obstructing the election, really had no existence. The crowd was assembled for a lawful purpose, and it appeared by the evidence that there was nothing that could be called a mob, until about four o'clock, by which time the election was over.

LORD ARDMILLAN charged the Jury.—He said, there was not in the indictment any charge of assault, except as part of the mobbing and rioting,—there is no special assault charged against any of the prisoners, apart from mobbing and rioting. As to the law of mobbing and rioting, it is settled that every person who forms part of a mob is responsible for what the mob does; but a crowd may be lawfully assembled, and every person in such a crowd is not responsible for all done by the crowd. It is only after a mob has assumed a serious character, and has given evidence of the purpose for

which it is held together, that persons are responsible for remaining in it, and for what the mob does ; because it is the duty of every well-disposed person to quit a mob whenever it becomes dangerous to the public peace. But electors and non-electors are entitled to be present in numbers at an election, and to express their feelings, even noisily, cheering and deploring as the election goes on—but when violence is manifested, the assembly is no longer a lawful one ; and from that moment, every act the mob does is shared in by every person present. The very idea of coercion in an election is inconsistent with order, in violation of law, and fatal to popular liberty. It was true that in this case no person was seriously injured ; yet an election riot is in its nature always a serious riot, because it becomes necessary to vindicate the purity and freedom of election from any attempt to interfere with the electors in the discharge of their privileges. The riot was not a serious one up to the time of the police arriving, but after that, the evidence shewed that the mob was a dangerous one, and alarming to the public peace. It then became unlawful and unsafe for any one to remain with that mob as a part of it, and every one who did so remain after the mob had shown its dangerous character, was responsible for the acts of the mob. As to the case against each of the accused individually, his Lordship pointed out that the testimony of two or three witnesses showed that Farquhar, Strachan, and Esson, were not only present, but actively engaged in the mob ; as regards Symon, the evidence was conflicting. Still, the case was one pre-eminently for a Jury to decide.

The Jury unanimously found the libel not proven. In respect of which verdict the panels were assoilzied *simpliciter* and dismissed from the bar.

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HER MAJESTY'S ADVOCATE—*W. Ivory, A.D.*

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AGAINST

GEORGE WILSON, JUN.—*Skelton—A. Robertson.*

FORGERY—UTTERING—EVIDENCE—MALICE—TIME—Objection to the specification of the uttering in a charge of forgery—repelled.

2. A witness allowed to refresh his memory by reference to a written document which had been in his possession uninterrupted since the occurrence in question.
3. Where, in a charge of forgery, a special defence had been given in for the panel, setting forth malice on the part of the principal witness—Question, how far back proof of such malice could competently be carried.

No. 6.
George
Wilson, Jr.

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1861.

Forgery,
&c.

George Wilson, a Sheriff officer was indicted and accused :

THAT ALBEIT, by the laws of this and of every other well-governed realm, Forgery ; As also, the wickedly and feloniously Altering and Vitiating any Receipt for Money or other Writing ; As also the wickedly and feloniously Using and Uttering, as genuine, any Forged or Altered and Vitiating Receipt for Money or other Writing, knowing the same to be forged or altered and vitiated, are crimes of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, that you the said George Wilson, junior, are guilty of the said crimes, or of one or more of them, actor, or art and part : IN SO FAR AS, you the said George Wilson, junior, having, on or about the 12th day of April 1851, received from James Duncan innkeeper, then and now or lately residing in or near New Pitaligo, in the parish of Tyrie, and shire of Aberdeen, a receipt for money or other writing, in the following or similar terms :—

‘ New Pitaligo 12 April 1851.

‘ Received from George Wilson Junior Sheriff officer the sum of
‘ Two Pound 1/3 Sterling being amount of Decree V^a James Gerrie
‘ also his own expenses 5/4

‘ James Duncan.’

‘ 2 . 1 . 3

‘ 5 . 4

‘ 2 . 6 . 7,’

you the said George Wilson, junior, did, on the 25th day of February 1859, or on one or other of the days of that month, or of January immediately preceding, or of March immediately following, in or near the house in or near Turclossie, in the parish of Tyrie aforesaid, then occupied by you, or in or near the house in or near Turclossie aforesaid, then occupied by the said George Wilson, senior, or at some other time or times and place or places in the shire of Aberdeen to the prosecutor unknown, wickedly and feloniously, and without authority from the said James Duncan, substitute or cause or procure to be substituted, the figure '6' for the figure 1 at the end of the date 1851 on said receipt or other writing, and did, wickedly and feloniously, and without authority from the said James Duncan, write or insert, or cause or procure to be written or inserted, the words and figures 'also Four Pounds 2/6 for A Lambs a/c & others per statement,' at the end of said receipt or other writing, and above the signature 'James Duncan' thereon, and did, wickedly and feloniously, and without authority from the said James Duncan, place or cause or procure to be placed, an adhesive draft or receipt stamp over the figures

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' 2 . 1 . 3

' 5 . 4

' 2 . 6 . 7,'

at the foot of said receipt or other writing, and did, wickedly and feloniously, and without authority from the said James Duncan, write or insert, or cause or procure to be written or inserted, on said draft or receipt stamp the figures

' 2 . 1 . 3

' 4 . 2 . 6

' 6 . 3 . 9,'

and did, wickedly and feloniously, and without authority from the said James Duncan, forge or adhibit, or cause or procure to be forged or adhibited, upon the said receipt-stamp, or partly upon the said receipt-stamp and partly upon the said receipt or other writing, the letters or initials 'J. D.,' intending the same to pass for, and be received as, the genuine subscription or initials of the said James Duncan; and all this you did, wickedly and feloniously, for the purpose of making it appear that the said receipt or other writing had been granted by the said James Duncan, on the 12th day of April 1856, instead of the 12th day of April 1851, and that the same was a genuine receipt by the said James Duncan, for the sum of £14, 2s. 6d. in addition to the said sums of £2, 1s. 3d., and 5s. 4d., or one or other of them; and the said receipt or other writing was thus, wickedly and feloniously, forged or altered and vitiated by you: FURTHER, a summons or action

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having, on or about the 22d day of December 1858, been raised before the Sheriff Small Debt Court of Aberdeenshire, at Peterhead, at the instance of the said James Duncan, as executor of the deceased Lewis Duncan, sometime merchant in New Pitsligo aforesaid, against you the said George Wilson, junior, concluding for payment of certain sums of money specified in an account annexed to the said summons, amounting in all to £5, 4s. 5d. or thereby, alleged to be due by you to the said James Duncan, as executor foresaid, and the said action having, on or about the 20th day of January 1859, been remitted by James Skelton, Esquire, sheriff-substitute of Aberdeenshire to the Ordinary Roll, you the said George Wilson, junior, did, on the 25th day of February 1859, or on one or other of the days of that month, or of January immediately preceding, or of March immediately following, in or near the office or premises situated in or near Lodge Walk, in or near Peterhead, then and now or lately occupied by Keith Forbes, solicitor, then and now or lately residing in or near Merchant Street, in or near Peterhead, or in or near the house in or near Merchant Street aforesaid, then and now or lately occupied by the said Keith Forbes, or at some other place in or near Peterhead, or in the shire of Aberdeen, to the prosecutor unknown, wickedly and feloniously use and utter, as genuine, the said forged or altered and vitiated receipt or other writing, by delivering the same, or causing or procuring the same to be delivered, to the said Keith Forbes, for the purpose of his preparing, and lodging in process, defences for you to the said action, founded upon the said forged or altered and vitiated receipt or other writing as genuine, and of his lodging the said last-mentioned receipt or other writing in process to support your said defences: FURTHER, the said Keith Forbes having declined to prepare defences for you to the said action, founded upon the said forged or altered and vitiated receipt as genuine, and having returned to you the said forged or altered and vitiated receipt, you the said George Wilson, junior, did, on the 14th day of April 1859, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, in or near the house or office or other premises situated in or near Jamaica Street, in or near Peterhead, then and now or lately occupied by William Gamack, solicitor, then and now or lately residing in or near Jamaica Street aforesaid, or at some other place in or near Peterhead, or in the shire of Aberdeen, to the prosecutor unknown, wickedly and feloniously, again use and utter, as genuine, the said forged or altered or vitiated receipt or other writing, by delivering the same, or causing or procuring the same to be delivered, to the said William Gamack, for the purpose of his preparing, and lodging in process, defences for you to the said action, founded upon the said forged or altered and vitiated receipt or other writing as genuine, and of his lodging the said last-mentioned receipt or other writing in pro-

cess, to support your said defences: FURTHER, the said William Gamack having prepared defences for you to the said action, founded upon the said forged or altered and vitiated receipt as genuine, you the said George Wilson, junior, did, on the 12th day of May 1859, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, in or near the office or premises situated in or near the Town-House of Peterhead, and then and now or lately occupied by Robert Maitland, then and now or lately sheriff-clerk-depute of Aberdeenshire, wickedly and feloniously, again use and utter, as genuine, the said forged or altered or vitiated receipt or other writing, by lodging the same, or causing or procuring the said William Gamack, or some other person to the prosecutor unknown, to lodge the same, along with said defences, in the hands of the said Robert Maitland, or some other person to the prosecutor unknown, as a production in process in said action to support your said defences, and as a genuine receipt by the said James Duncan, for the said sum of £4, 2s. 6d., in addition to the said sums of £2, 1s. 3d. and 5s. 4d., or one or other of them, for the purpose of founding on the same, or causing the same to be founded on, in support of your defences to said action; and the said forged or altered and vitiated receipt or other writing was thereafter founded on, or caused to be founded on, by you, in support of your defences to said action accordingly.

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SKELTON and ROBERTSON, for the panel, objected to the relevancy of the indictment, that, as regarded the first charge, the mere fact of giving the receipt to an agent and getting it back, could not constitute an act of uttering. The document had never been lodged in process.

LORD COWAN said, this was just a part of the history of the case, and must stand or fall with the charge of uttering through Gamack. If that charge was not proved, then this could not be looked to, but the prosecutor was entitled to prove it as part of the narrative of the case.

The relevancy of the indictment having been sustained, the panel pleaded not guilty, and a special defence was given in for him, to the effect that Duncan had, out of ill will, falsely and maliciously represented that the genuine receipt had been altered by the panel.

In the course of the examination of James Duncan

No. 6. the witness produced from his pocket-book a copy of
 George the receipt. He deponed, 'I got this copy from the
 Wilson, Jr. 'prisoner at the date, 12th April 1851. It is a copy
 Aberdeen. 'of the receipt subsequently altered. It has remained
 May 1. 'in my possession ever since. I never showed it to
 1861. 'any one.'
 Forgery,
 &c.

Counsel for the panel objected—This document could not be used or referred to, as it was not founded on and included in the inventory.

The Court were of opinion that the witness, having sworn that this was a document which he got into his possession at the time, and which had remained in his possession ever since, was entitled to use it to refresh his memory.

In cross-examination, it was proposed to ask the witness specific questions as to whether he made certain statements to different persons against the panel, the questions referring to periods varying from a day to a month.

It was objected for the prosecution, that under the act 15th and 16th Vict. c. 27, sect. 3, it was competent to ask such questions only in regard to a specific occasion.

The counsel for the panel replied, that the present was a different case from that contemplated by the act. What was here sought to be proved was the matter of special defence.

LORD COWAN.—The ruling we are now about to give in reference to the latitude in point of time, is to apply only to questions hereafter to be put to witnesses for the panel—a latitude of time to the extent of a month, whether the witness had previously stated such a thing against the panel ; whether, on a particular day, or within a day or two, during one month, he did make such statements in presence of certain persons.

LORD ARDMILLAN.—I quite concur. We must be careful to protect the law and the interest of a witness. The specified occasion must in general be much more specific than within a month—on or about a particular

day. On the other hand, seeing the special defence that this witness has used expressions of particular malice, we think that one month is a reasonable limit within which to allow such proof of malice.

No. 6.
George
Wilson, Jr.
Aberdeen.
May 1.
1861.
Ferguson,
&c.

LORD COWAN.—The reason of tying prisoners down in regard to the time which may be allowed them as to proving malicious feeling is, that it ought to be known when that malicious feeling was entertained ; for the Jury will naturally give much more weight to evidence of malice evinced within a month, than to evidence of malice shown a year or years ago. The special defence must be dealt with altogether independently of the act libelled, and the foundation should be laid by asking this witness whether at any time he had expressed malice against the prisoner.

WEST CIRCUIT.

GLASGOW.

Judge—LORD DEAS.

April 28.
1861.

HER MAJESTY'S ADVOCATE, *Maitland-Heriot A. D.*

AGAINST

WILLIAM THOMPSON *alias* WILLIAM MURRAY, AND GEORGE BRYCE
alias ROBERT WILSON—*Nevay—Couper*.

STOUTHRIEF — HOUSEBREAKING — THEFT — ASSAULT — AGGRAVATION
—INDICTMENT—RELEVANCY.—Objections to an indictment charging Stouthrief, especially when committed by means of housebreaking, and by a person who has been previously convicted of theft, as also, assault—repelled.

WILLIAM THOMPSON *alias* WILLIAM MURRAY, and GEORGE BRYCE *alias* ROBERT WILSON, were indicted and accused :

No. 7.
William
Thompson
& George
Bryce.
Glasgow.
April 28,
1861.
Stouthrief,
&c.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Stouthrief, especially when committed by means of House-breaking, and by a person who has been previously convicted of theft ;

No. 7.
William
Thompson
& George
Bryce.

Glasgow.
April 23.
1861.

Stouthrief,
&c.

as also Theft, especially when committed by means of Housebreaking, and by a person who has been previously convicted of theft; as also Assault, especially when committed to the injury of the person, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said William Thompson *alias* William Murray are guilty of the said crime of stouthrief, aggravated as aforesaid, or of the said crime of theft, aggravated as aforesaid, and of the said crime of assault, aggravated as aforesaid, or of one or other of the said crimes, actor, or art and part; and you the said George Bryce *alias* Robert Wilson are guilty of the said crime of stouthrief, aggravated by having been committed by means of housebreaking, or of the said crime of theft, aggravated by having been committed by means of housebreaking, and of the said crime of assault, aggravated as aforesaid, or of one or other of the said crimes, actor, or art and part: IN SO FAR AS, on the 13th or 14th day of February 1861, or on one or other of the days of that month, or of January immediately preceding, or of March immediately following, you the said William Thompson *alias* William Murray and George Bryce *alias* Robert Wilson did, both and each or one or other of you, wickedly and feloniously, break into and enter the dwelling-house at Longhill, in the parish of Lanark and shire of Lanark, then and now or lately occupied by Alexander Smith, farmer, now or lately residing there, by removing a portion of the thatch and turf covering the roof of a milk-house, forming part of the offices of said farm, and entering at the aperture so formed, and by cutting or breaking a hole or opening in a lath and plaster partition between the said milk-house and a byre communicating with the said dwelling-house, and passing through the said hole or opening into the said byre, and thence into the said dwelling-house, or in some other manner to the prosecutor unknown; and having thus obtained entrance into the said dwelling-house, you the said William Thompson *alias* William Murray and George Bryce *alias* Robert Wilson did, both and each or one or other of you, then and there wickedly and feloniously, attack and assault the said Alexander Smith and Margaret Finlay or Smith, his wife, then and now or lately residing with him, or one or other of them, then in bed in said house, and did brandish a carving knife or other large knife over them, and did threaten to kill them, or one or other of them, and to burn the house, if they did not deliver up their money to you; and the said Alexander Smith having got out of bed, you did attack and assault him and struggle with him, and did with a gun, then lying in said house, strike him one or more blows on or about the shoulder or other part of his person, to the injury of his person, by all which, or part thereof, the said Alexander Smith, and Margaret Finlay or Smith, and Mary Flood, their servant, then residing with them, were put in a state of great bodily fear and alarm; and having by your said violence and threats overpowered and intimidated the said Alexander

Smith, and the said Margaret Finlay or Smith, or one or other of them, you the said William Thompson *alias* William Murray and George Bryce *alias* Robert Wilson, did, both and each or one or other of you, then and there, wickedly, masterfully, and feloniously, steal and theftuously away take from the said dwelling-house two bank or banker's notes for five pounds sterling each, twenty shillings, or thereby, in silver money, a purse, a silver or other metal watch, and a plaid, the property, or in the lawful possession, of the said Alexander Smith: OR OTHERWISE, time above libelled, you the said William Thompson *alias* William Murray and George Bryce *alias* Robert Wilson did, both and each or one or other of you, wickedly and feloniously, break into and enter the house above libelled, in manner above libelled; and having, in manner above libelled, obtained entrance into said house, you did, then and there, wickedly and feloniously, steal and theftuously away take the money and articles above libelled, or part thereof, the property, or in the lawful possession, of the said Alexander Smith: And you the said William Thompson *alias* William Murray have been previously convicted of theft.

No. 7.
William
Thompson
and George
Bryce.
Glasgow.
April 25.
1861.
Stouthrief,
&c.

NEVAY, for the panels, objected to the relevancy, in respect, (1.) That stouthrief could not be libelled with an aggravation of housebreaking, which, in the present case, was of the essence of the crime charged. (2.) That the subsumption of the minor contained two substantive charges, viz., stouthrief, with an alternative of theft by housebreaking *and* assault; while in the *species facti*, no assault was charged separate from the acts of violence making up the charge of stouthrief. He contended, therefore, that the assault must be departed from as having no *species facti* to support it.

The objections were repelled, and the libel found relevant.

The panel Thompson pleaded guilty of the theft as libelled, but not guilty of the other charges.

The Jury unanimously found the panel Thompson guilty of stouthrief and assault as libelled; and, with one dissenting voice, found the panel Bryce also guilty of stouthrief and assault as libelled.

No. 7.
William
Thompson
and George
Bryce.

Glasgow.
April 25.
1861.

Stouthrief,
&c.

May 20
1861.

Sentence penal servitude—Thompson for fifteen years,
and Bryce for ten years.¹

HIGH COURT.

Present,

THE LORD JUSTICE-GENERAL.

LORDS DEAS AND NEAVES.

HER MAJESTY'S ADVOCATE,—*Sol.-Gen. Maitland—Hector, A.D.*

AGAINST

JOHN NELLIS OR NEILLUS,—*Muirhead.*

INDICTMENT—LIBELLING OF STATUTES—RETURNING FROM PENAL SERVITUDE—STATUTES 5TH GEO. IV., c. 84; 4TH AND 5TH WILL. IV., c. 67; 9TH AND 10TH VICT., c. 24; 20TH AND 21ST VICT., c. 3.—(1.) In a prosecution for returning from penal servitude, libelled on the enactments 5th Geo. IV., c. 84, sects. 2 and 22; 4th and 5th Will. IV., c. 67; and 20th and 21st Vict., c. 3, sect. 2, which make the punishment for the crime transportation for life,—*held* that the Court had power to impose a short term of penal ser-

¹ At the Ayr Circuit, October 2. 1860, John Smith was charged with 'theft, especially when committed by means of housebreaking, and by a person who has previously been convicted of theft, and of 'stouthrief.' [Then followed the narrative]. In the list of productions was 'an extract or certified copy of a conviction of the crime of 'stouthrief obtained' against you the said John Smith, under the name of Daniel Sillers, before the Circuit Court of Justiciary, held at Inverary on the 24th day of September 1851.'

Objection was taken that previous conviction for *stouthrief* could not be relevantly charged as an aggravation of a charge of *theft*, but the objection was repelled, and the panel having been convicted, was sentenced to penal servitude for fourteen years.

Judges—LORDS COWAN AND DEAS.

Act. Maitland Heriot A.D.—Alt. Hope.

vitute, although the enactments 9th and 10th Vict., c. 24, sect. 1, and 20th and 21st Vict., c. 3, sect. 2, empowering them to do so, were not libelled. (2.) Circumstances in which the Court imposed a sentence of one month's imprisonment and three years penal servitude, for returning from penal servitude.

No. 8.
John Nellis
or Neillus.
High Court.
May 20.
1861.

John Nellis or Neillus was indicted and accused—

Returning
from Penal
Servitude.

THAT ALBEIT, by an Act passed in the fifth year of the reign of His Majesty King George the Fourth, chapter eighty-four, intituled, 'An Act for the Transportation of Offenders from Great Britain,' it is by section second enacted, 'That from and after the commencement of this Act, every person convicted before any Court of competent jurisdiction in Great Britain of an offence for which he or she shall be liable to be transported or banished, shall be adjudged and ordered to be transported or banished beyond the seas for the term of life, or years for which such offender shall be liable by any law to be transported or banished:' And by section twenty-second of said Act it is enacted, 'That if any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree, to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former Act, shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced, or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death, as in cases of felony, without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished:' And by another Act passed in the fourth and fifth years of the reign of His late Majesty King William the Fourth, chapter sixty-seven, intituled, 'An Act for abolishing capital punishment in case of returning from transportation,' it is, on the recital of the said Act of the fifth year of the reign of His Majesty King George the Fourth, or of the said twenty-second section thereof, enacted, 'That so much of the recited Act as inflicts the punishment of death upon persons convicted of any offence therein and hereinbefore specified shall be and the same is hereby repealed; and that, from and after the passing of this Act, every person convicted of any offence above specified in the said Act of the fifth year of the reign of His late Majesty King George the Fourth, or of aiding or abetting, counselling or procuring, the commission thereof, shall be liable to be transported beyond the seas for his or her natu-

No 8. ' ral life, and previously to transportation shall be imprisoned, with
 John Nellis ' or without hard labour, in any common gaol, house of correction,
 or Neillus. ' prison or penitentiary, for any term not exceeding four years : ' And
 High Court. by another Act passed in the 20th and 21st year of the reign of Her
 May 20. Majesty Queen Victoria, chapter three, intituled, ' An Act to amend
 1861. ' the Act of the sixteenth and seventeenth years of Her Majesty, to
 Returning ' substitute in certain cases other punishment in lieu of transportation,'
 from Penal ' it is enacted by section third, ' All Acts and provisions now applicable
 Servitude. ' to and for the removal and transportation of offenders under sentence
 ' or order of transportation, to and from any places beyond the seas,
 ' and concerning their custody, management, and control, and the
 ' property in their services, and the punishment of such offenders if
 ' at large without lawful cause before the expiration of their sentence,
 ' and all other provisions now applicable to and in the case of persons
 ' under the sentence or order of transportation, shall apply to and in
 ' the case of persons under sentence or order of penal servitude, as if
 ' they were persons under sentence or order of transportation : ' YET
 TRUE IT IS AND OF VERITY, that you the said John Nellis or Neillus
 are guilty of the said crime or offence of being at large within Her
 Majesty's dominions, without lawful cause, before the expiration of
 the term for which you have been sentenced to penal servitude, actor,
 or art and part : IN SO FAR AS, you the said John Nellis or Neillus
 having been indicted before the Circuit-court of Justiciary, held at
 Perth, in the month of September 1856, for the crime of theft, aggra-
 vated by housebreaking, and by your being habite and repute a thief,
 and having been previously convicted of theft, and you the said John
 Nellis or Neillus having, by the verdict of a jury, been convicted of
 the said crime of theft, aggravated as aforesaid, before the said Circuit-
 court at Perth, on the 29th day of September 1856, and the said Court
 having, then and there, in respect of the said verdict, sentenced you to
 penal servitude for the period of six years, from the said 29th day of
 September 1856 ; NEVERTHELESS, you the said John Nellis or Neillus
 were, on the 9th day of March 1861, or on one or other of the days of
 that month, or of February immediately preceding, found at large,
 without lawful cause, before the expiration of the term of the said sen-
 tence of penal servitude, in or near the house or premises situated in
 or near Old Assembly Close, High Street, Edinburgh, then and now
 or lately occupied by William Nellis, then and now or lately residing
 there.

MUIRHEAD, for the panel, objected to the relevancy—
 (1.) That the indictment set forth no crime. Returning
 from transportation or penal servitude was not an
 offence at common law ; it was a crime only by force

of statute, and inasmuch as punishment was declared to be its consequence, as it was required in all indictments that *a crime* should be charged, it was therefore necessary, in such a one as the present, that the punishment, without which the crime could not exist, should be distinctly and accurately set forth. But it was not ; the only punishment set forth as consequent on a man's being found at large before the expiry of his term of sentence, was transportation—a punishment not now known to the law. To set forth a punishment which no Court could award, was the same thing as to set forth no punishment at all ; and in such a case, to set forth no punishment was to set forth no crime. (2.) That the Act 9th and 10th Vict., cap. 24, sect. 1, giving power to the Court, in certain cases, to award sentences of transportation of shorter duration than they were previously empowered to do ; and the Act 20th and 21st Vict., cap. 3, sect. 2, substituting sentence of penal servitude for that of transportation, had not been libelled on. In the case of *James Martin*, High Court, Nov. 16, 1835, Swinton, vol. i. p. 1, which was before the date of the 9th and 10th Vict., in an indictment for returning from transportation, the omission to libel in the Act 4th and 5th Will. IV., cap. 67, which reduced the punishment applicable to the case, from death to transportation for life, was held fatal. On the same principle, in the present case, the omission to libel on the Acts of Victoria, destroyed the indictment. As it stood, the Court could not pass a milder sentence than that of penal servitude for life, with previous imprisonment not exceeding four years ; whereas, if the Acts of Victoria were libelled on, the Court might award a sentence of three years penal servitude, with previous imprisonment for any period not exceeding two years.

The SOLICITOR-GENERAL, for the prosecution.—The objections very much ran into each other. The case of *Martin* was not one in point. There the objection taken and sustained was, that the 4th and 5th Will. IV., c. 67,

No. 8.
John Nellis
or Neillua.

High Court.
May 30.
1861.

Returning
from Penal
Servitude.

No. 8. was not libelled on. But the reason why the omission
 John Nellis or Neillus. was in that case held fatal was, that the Act of William
 High Court. absolutely repealed so much of the Act 5th Geo. IV.,
 May 20. cap. 84, as inflicted capital punishment on persons re-
 1861. turning from transportation, thereby abolishing the
 Returning from Penal Statutory offence; which, however, was, by the very
 Servitude. same clause, re-established, the punishment being re-
 duced to transportation for life. Under the indictment
 as it stood in that case, there was truly no offence set
 forth; for the only statute founded on had been in its
 operative part repealed. But neither the Act 9th and
 10th Vict., cap. 24, nor the Act 20th and 21st Vict.,
 cap. 3, repealed the Act of William IV.; returning from
 penal servitude still remained a statutory offence, not-
 withstanding their enactment. In practice those sta-
 tutes of Victoria were never founded on, even in the
 case of statutory offences, as, for example, in that of an
 indictment for forgery. They were general empower-
 ing statutes, to be taken notice of judicially, without
 being libelled on.

MUIRHEAD, in reply, said that what he maintained
 was this—that a man returning from penal servitude
 was a criminal only because he was, by statute, but not
 at common law, liable to punishment. The crime could
 not exist apart from the punishment; for the act was
 not even forbidden. It was therefore necessary that
 the punishment applicable in the case should be set
 forth in the indictment. The practice in cases of forgery
 afforded no rule of guidance; for that was an offence
 at common law, and statute only regulated the punish-
 ment applicable to it as such.

After consultation—

LORD DEAS.—The leading statute founded on and
 quoted in the indictment is the Statute 5th Geo. IV.,
 cap. 84, sect. 2, which does not substantively enact that
 being found at large during the currency of a sentence
 of transportation shall be an offence, but simply enacts,
 that every person so found, ‘being thereof lawfully con-

'victed, shall suffer death.' The Statute 4th and 5th Will. IV., c. 67, also founded on and quoted in the indictment, repeals this punishment, and substitutes for it transportation for life, preceded by a certain period of imprisonment. But the subsequent statute 9th and 10th Vict., c. 24, which confers a discretion to limit the punishment to transportation for not less than seven years, or imprisonment not exceeding two years, and the enactment in the Statute 20th and 21st Vict., c. 3, which substitutes penal servitude for transportation, are not noticed in the indictment. Now the objection taken is, that, on the face of the indictment, it appears to be imperative on the Court to award transportation for life, preceded by a certain term of imprisonment, whereas, by the subsequent enactments not libelled on, this is not imperative; and, moreover, that the statutory punishment of transportation is abolished, and penal servitude substituted.

No. 8.
John Nellis
or Neillus
High Court.
May 20.
1861.
Returning
from Penal
Servitude.

I am rather disposed to think this objection ought to be sustained. We are called upon to award a statutory punishment for an act which is not alleged to be a common law offence, and which is not even substantially declared a statutory offence, but to which act there is attached, by statute, a certain punishment; and this being so, I think it ought to have appeared, on the face of the indictment, what the statutory punishment competent to be awarded really is. I do not think the argument that statutes of a general kind, altering or modifying punishments, do not require to be libelled, can be fairly applied to a case of this peculiar kind. The libel not only withholds enactments which, it is admittedly essential we should have before us, but is calculated to mislead; and, upon the whole, I think the more satisfactory course would be to reject it.

LORD NEAVES.—I am of opinion that these objections are not well founded. The offence of returning from transportation is created by two special statutes, the 5th Geo. IV., and the 4th and 5th William IV. Both of those

No. 8.
John Nellis
or Neillus.
High Court.
May 20.
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from Penal
Servitude.

statutes are here libelled, and it was proper and necessary to do so, particularly as the second act, in a substantial point, repeals the first. By another statute, the 20th and 21st Victoria, all acts and provisions as to returning from transportation, or the punishment of that offence, are made applicable to the case of penal servitude, and that statute is also here libelled, and properly so. But it is said that there is an omission in the indictment to libel another statute, the 9th and 10th Vict., by which, in all cases where a long term of transportation is the prescribed punishment, the Court is allowed, at its discretion, to mitigate that sentence in a certain manner, and within certain limits, I am of opinion that it was not necessary to libel that statute. It does not specially relate to this offence, and it has no effect in creating the offence. Neither does it repeal the special statutes libelled. It merely introduces a general power of relaxation in the administration of justice, at the discretion of the Court, to the benefit of which the prisoner is entitled, but which I cannot see that the prosecutor was bound to set forth. As little, in my opinion, was it necessary for him to set forth the clause of the last statute of the 20th and 21st Victoria, discontinuing sentences of transportation, and substituting penal servitude therefor. This clause affects the general system of penal justice as regards the form of punishment, but it does not alter the character of this, or of any other special offence. On that ground, I think it was not necessary to set it forth, and in practice, I am satisfied that it is never done.

The LORD JUSTICE-GENERAL.—My opinion in this case concurs with that last delivered. No doubt the indictment might have set forth more clearly the *progress* of the successive statutory enactments; but the question is, whether this defect is fatal? I cannot think that it is so. The statute said to have been omitted in the libel, is not one which imposes a particular measure of punishment; it gives a general power to the Court. It is not necessary

that the Court should be informed that this general power of relaxation has been given to it ; it is enough that it is given.

The libel having been found relevant, the panel pleaded guilty.

MUIRHEAD, in mitigation of punishment, submitted that, in the circumstances, the Court should exercise the power which they held themselves to possess, and, if they thought fit, of awarding a more lenient sentence than the indictment seemed to authorise. What the panel had done was no crime at common law, and was only what every prisoner was naturally expected to do when opportunity presented itself ; he had regained his liberty by flight. In no country in Europe but our own was this regarded as a crime, unless when accompanied by violence to persons or property. There was no suggestion of any such violence in the present case. The panel had escaped from Gibraltar about two years before the expiry of his term of sentence, through the connivance, as was said, of one of the warders ; but it was not said that he had broken prison, or done harm to any one in charge of him. Since his return to this country two years ago, he had been supporting himself and his family by honest industry, and had obtained from his employers very excellent certificates of character.

In the circumstances, the Court restricted the sentence to three years' penal servitude, with one month's previous imprisonment.

No. 8.
John Nellis
or Neillus.
High Court.
May 20.
1861.
Returning
from Penal
Servitude.

Present,

THE LORD JUSTICE-GENERAL,

LORDS COWAN AND NEAVES.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Mailland—Shand, A.D.*

AGAINST

ROBERT HAWTON AND WILLIAM GEORGE PARKER—*G. Young—
D. Mackenzie.*

MURDER—CULPABLE HOMICIDE.—In the trial of a boatswain and a marine of one of her Majesty's ships for the crime of culpable homicide, in having fired on a party of trawlers, and killed one of them, the Lord Justice-General directed the Jury that the marine was bound to obey the orders of the boatswain, unless his orders were flagrantly illegal; and that if the Jury were of opinion that the prisoners had acted according to the usage of the naval service, and not recklessly, they were entitled to an acquittal. The Jury returned a verdict of Not Guilty.

No. 9.
Robert
Hawton &
William
George
Parker.

ROBERT HAWTON, boatswain, and WILLIAM GEORGE PARKER, a marine on board her Majesty's steamer 'Jackal,' were charged with Murder, or Culpable Homicide :

High Court.
July 15.
1861.
Culpable
Homicide.

IN SO FAR AS, on the 6th or 7th day of June 1861, or on one or other of the days of that month, or of May immediately preceding, at or near that part of the east shore or beach of Lochfyne called or known as Otter Bank or Otter Spit, situated about 620 yards, or thereby, to the south or south-west of East Otter Pier, measuring along the said shore or beach, in the parish of Kilfinan, and county of Argyll, you the said Robert Hawton and William George Parker did, both and each or one or other of you, several or one or more times, wickedly and feloniously discharge a rifle or other gun, and a revolver or other pistol, or one or other of them, both or one or other of them being loaded with powder and ball or other hard substance or substances to the prosecutor unknown, or some other fire-arm or fire-arms to the prosecutor unknown, loaded as aforesaid, at the now deceased Peter M'Dougall, fisherman, then or lately before residing in or near Ardri-shaig, in the parish of South Knapdale and county of Argyll, and Duncan M'Brayen, Alexander M'Brayen, Neill M'Ewan, Archibald M'Ewan, Archibald Morrison, Hugh M'Farlane, and Robert Bruce, all

fishermen, and all now or lately residing in or near Ardrishaig aforesaid, or one or more of them, who were then, all and each or one or more of them, in a boat on Lochfyne aforesaid, and distant thirty-five yards, or thereby, or other short distance, from that part of the shore or beach of Lochfyne above libelled; and one or more of the shots discharged as aforesaid did take effect on the said Peter M'Dougall, and he was thereby mortally wounded on or near the head and face, and, in consequence, immediately or soon thereafter died, and was thus murdered by you the said Robert Hawton and William George Parker, or one or other of you: OR OTHERWISE, time and place above libelled, you the said Robert Hawton and William George Parker did, both and each, or one or other of you, several or one or more times, culpably and recklessly discharge a rifle or other gun, and a revolver or other pistol, or one or other of them, both or one or other of them being loaded with powder and ball or other hard substance or substances to the prosecutor unknown, or some other fire-arm or fire-arms to the prosecutor unknown, loaded as aforesaid, at or in the direction of the said Peter M'Dougall, and the said other persons, or one or more of them, who were along with him in the said boat on Lochfyne, and distant thirty-five yards, or thereby, or other short distance from that part of the shore or beach of Lochfyne above libelled; and one or more of the shots discharged as last above libelled, did take effect on the said Peter M'Dougall, and he was thereby mortally wounded on or near the head and face, and, in consequence, immediately or soon thereafter died, and was thus culpably killed by you the said Robert Hawton and William George Parker, or one or other of you.

No. 9.
Robert
Hawton &
William
George
Parker.
High Court.
July 15.
1861.
Culpable
Homicide.

The counsel for the panels moved for a separation of the trials, on the ground that they were alone together upon the shore when the shots charged in the libel were fired, and that it was necessary to the defence of each, that he should have the evidence of the other as a witness; and that this was the more necessary, because the panels were at the time engaged in the public service, the one acting under and according to the orders of the other,—the giving of which, and their terms it was desirable to prove.

The LORD JUSTICE-GENERAL said, the Court was of opinion, that no sufficient grounds had been made out for granting a separation of the trials. It did not appear that the panels were put to any disadvantage by being tried together. Their relative position could easily be

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Hawton &
William
George
Parker.
High Court.
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Homicide.

established by other evidence than their own. So, also, as to the nature of the service on which they were sent, the nature of the persons against whom they acted,—all these things could easily be established in the ordinary way ; and as to persons so situated and so employed, the law had its own presumptions, which it was necessary for the prosecutor to overcome.

The motion was therefore refused.

The panels pleaded Not Guilty.

EVIDENCE FOR THE PROSECUTION.

DUNCAN M'BRAYEN, *fisherman*.—I live at Ardrishaig. I have a fishing-boat called the 'Weatherside.' I went to fish on the afternoon of 6th June. Another boat (the 'Star') was with us. Peter M'Dougall, Ardrishaig, was in my boat; also Neil M'Ewan, Archibald Morrison, and Archibald M'Ewan. In the 'Star,' Robert Bruce, John Hamilton, Dugald M'Ewan, and Hugh M'Farlane. We went to Otter Bay, and were fishing there with a trawl net. When we were fishing we put out an anchor. About midnight we anchored near Otter Pier, about thirty or thirty-five yards from shore. The anchor was from the 'Star.' The other boat was holding on by the 'Star.' I was doing so. The net was in the 'Star.' The herrings we had taken were in the 'Weatherside.' We did not fish after anchoring near the shore. We were about six hundred yards from the pier, and about thirty or thirty-five yards from the bank called the Spit. The Spit was covered by the tide at the time. We were redding the net, and talking and smoking. We had drawn the net, but there were no herrings in it at that shot. About half an hour after anchoring—i.e., about 12 o'clock—I heard a cry and a shot about the same time. I cannot say which first. They came from the same place. I looked, and saw two more men. They cried to us to come in with that boat. We cried we were coming. They fired at us so hard that the men could not sit at their oars. They called more than once to come in with that boat. They fired five or six shots within three or four minutes. We heard something whistling by us, which we took for balls. We heard this more than once. We believed that they were firing ball. Before this, all the men were in the 'Weatherside,' except Dugald M'Ewan and John Hamilton, who were in the 'Star.' I heard some cry to cut the rope, and it was cut, and we pulled to shore as fast as we could for the firing, which frightened the men, and made them lie down in the boat. When the boat struck the beach, N. M'Ewan called my attention to M'Dougall. I looked, and saw him lying close to the gunwal, on the front side—his head down,

and blood flowing on to his shoulder. He appeared to be dead. Neil M'Ewan said that M'Dougall was dead. The two men were then close to the bow of the boat. After looking at M'Dougall, I looked up and saw the two men running up from the beach. I jumped ashore, and after running about a hundred yards, I overtook them. I recognised Hawton. He had on a blue wincey jacket, and had a pistol in his hand. The other I did not know. He had on a cloak or wide great coat. He had a musket, or what I took to be one. I told them they had murdered the man, and that what I wanted was to know who they were. The officer Hawton said, that if there was anything wrong, he was the man I had to do with. I asked his name. He gave it, and said he belonged to the 'Jackal.' He said something about a boat. I don't remember what. He went away. I understood he was going for his boat, to assist us in regard to the dead man. Alexander M'Brayen came up while I was with the two men. While we were in our boat I heard Alexander M'Brayen cry out that he had got a ball in the hand. That was after the second or third shot. Next morning I saw his hand. It was cut. When the two men went away, we returned to our boat, and struck a light, and examined M'Dougall's body, and found a wound in the left temple. We rowed to Auchnaba, on the opposite side of Lochfine. Before we landed at the other landing, we had thrown our net overboard. We took it up again before crossing to Auchnaba. From Auchnaba we went to Lochgilphead for a doctor. After that we went to Ardrishaig, and took M'Dougall's body home. Dr M'Nab came and saw him. Dr Hunter and Dr Campbell also came and saw him. I have measured the distance from where the two men stood to the other pier. That spot was above six hundred yards to S.W. of Pier, along the shore. I called from the boat to the man on shore while the firing was going on. I called for God's sake not to kill us; and when about ten feet of shore, 'In God's name what are you at?' One of them answered, 'Come on shore, and we'll damned soon let you know what we are.' There were no shots after that. We had no suspicion that they belonged either to the Jackal or Jackdaw.

Cross-examined for the panels.—We had set out from Ardrishaig about six o'clock. I commanded the 'Weatherside.' There was only one net between the two boats. In trawling, two boats are engaged with one net. The 'Star' was the boat that shot the net. She was then loose, and the 'Weatherside' at anchor. The net was hauled into the 'Star.' She was then at anchor. We then lifted the anchor of the 'Weatherside.' About five or six minutes after dragging the nets, the first shot was fired. After the first shot was fired some of the men came from the 'Star' into the 'Weatherside,' leaving two in the 'Star.' Those who so came into the 'Weatherside' were Neil M'Gowan, Hugh M'Farlane, Archibald Morrison, Robert Bruce,

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and Alexander M'Brayen. I suppose they thought they were safer in the 'Weatherside.' The 'Star' was at anchor, and the net was in her, and she was nearer the shore. The net was sunk by Dugald M'Ewan and J. Hamilton, after the others left the 'Star.' I did not see them sink it. I saw it afterwards lifted. A trawl-net is sunk by throwing it overboard. It did not sink entirely. When it is to be sunk entirely a stone is attached. There was no stone on this occasion. I thought it likely that the men on shore might seize the net. Trawling is against law. I knew that the 'Jackdaw' was on the coast, and sent out boats at night to seize trawl-nets. We used to have men on watch to give us warning, and had so that night. The men on the watch that night were about half a mile from us on the water. The usual signal was to show a light, and then we could throw out the net. We had no watchman on shore that night. When we were hailed from the shore there was nothing to prevent the 'Weatherside' pulling in. We began to pull in three or four minutes after the first hail. The 'Star' was at shore first. We could not row in the 'Weatherside,' because of men lying in the bottom of the boat. Bullets ceased when we began to pull to shore. It was a close calm night, not very clear. I supposed that the two men that we saw on the shore were in the service, for putting down trawling. It is at night or in the evening that we trawl. I knew that the men sent from the steamer were always armed. I did not know that they were in use to fire to bring boats to, about Ardrishaig, but I had heard of their doing so at Tarbert, about twelve miles below Ardrishaig. It is a great place for trawling. Hawton ran pretty hard. He stopped when I came within four or five yards of him. I was crying after him. My idea was, that as they knew they had done the deed, they were running off. They were about fifteen or sixteen yards a-head of me, running, when I began to run after them.

Re-examined for the prosecution.—Legal fishing is also practised at night. I knew that there were police on shore, to prevent trawling. I did not know whether they were armed.

ALEXANDER M'BRAYEN, *fisherman*.—On the 6th June I went with Duncan M'Brayen to the trawling. The 'Weatherside' and 'Star' together. Our last shot was near the Spit of Otter. The anchor of the 'Star' was out. We saw two men on the bank at the neck of the Spit running towards shore. A cry and a shot came about the same time. No words. I did not hear the whistle of the bullet of the first shot. As soon as they fired the first shot they cried to come ashore with the boat. Duncan M'Brayen answered, that we were coming. The next thing was a shot. There were five or six shots in less than five minutes. They continued to cry to come in shore. Duncan M'Brayen said, 'In the name of God what are you at all.' One of them answered, 'Come on shore, and I'll damned soon show you what

'we are.' At this time we were going towards shore, and lying in the bottom of the boat, except Duncan M'Brayen. I was rowing while lying in the bottom of the boat. I heard the whistle of bullets at every shot but the first. I had my hand to my face, when two or three shots wounded my hand. P. M'Dougall was in the same boat with me—on the shore side of me. He leaned towards me. Neil M'Ewan was the first to notice M'Dougall, and cried that he was dead. I cannot say which shot hit him. The firing was over at this time. I went on shore. Duncan M'Brayen went after the two men, who were running. I went after Duncan, and came up about a minute after he overtook them. I cannot identify them. One gave his name, but I forget it. He said he belonged to the 'Jackal.' He was dressed in a blue jacket. The other had a grey cloak or coat,—a marine. We took M'Dougall's body home. The distance from Otter Pier to where the two men stood is above six hundred yards. I saw it measured.

Cross-examined for the panels.—I was in the 'Weatherside' when we heard the first hail. The net had been pulled in about five minutes before. The 'Star' shot the net. When the first shot was fired two or three men jumped from the 'Star' into the 'Weatherside.' The 'Star' was next the shore, at anchor. The 'Weatherside' was not fastened. Nothing to prevent her coming ashore, except bullets. The net was thrown overboard after the first fire. It takes about a minute to throw out a net. We always throw our net over when we see our enemies. The net was thrown over after the men had gone into the 'Weatherside.' As soon as the net was thrown over the 'Weatherside,' we began to pull ashore. The 'Star' got to shore first. There was only one shot fired before we began to pull ashore, but we made no way, as we were lying in the bottom of the boat to save ourselves. From the time of the first shot till the boat touched the beach would be about four minutes. After we began to make way we did not take above a minute to get to shore. The bullet that struck my hand took off a little skin, and grazed my cheek, and touched my hair. I took it to be a bullet. We supposed the men on shore to be our enemies, and to belong to the 'Jackal' or 'Jackdaw.' There were no marks of bullets in the boat. The night was calm. It was after I was grazed that I lay down in the bottom of the boat. When I was grazed no person was rowing but myself, and no way was made. We had a boat on watch;—the 'Redjacket.' The men in the 'Star' were throwing over the net while the firing was going on.

Re-examined for the prosecution.—The anchor rope of the 'Star' was cut to make quick work.

To the Jury.—The depth of water was about two fathoms.

To the Court.—The 'Star' pulled to shore while the shots were firing.

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HUGH M'FARLANE, *fisherman*.—I was in the 'Weatherside' trawling. We were near Otter Spit when we heard from shore a cry and shot. I cannot say which was first. There were from five to seven shots fired within one and a half or two minutes. I heard the men on shore call to come in with that boat. Duncan M'Brayen answered, to give us time and we would go in with the boats. I did not hear anything said, or order given by one man on shore to the other. I did not hear one of them say fire. I heard like a noise of balls going over my head. Alexander M'Brayen called out that he was struck. The men in the 'Weatherside' bent down in the boat. A few strokes took the boat to shore. We began to pull her to shore about the middle of the firing. It stopped rather before we got to shore. I heard the order given to heave the net overboard. This was by one of the crew of the 'Star'—loud enough for everybody to hear it. It took from one to two minutes to heave net over. The firing was then going on. After the net was thrown over there was no more firing.

To a Juryman.—The people on shore could not see what was doing throwing the net over.

To the Court.—I was wrong in saying that we began to pull ashore about the middle of the firing.

DUGALD M'EWAN, *fisherman*.—I was in the 'Star.' We heard shots coming from shore, and men crying to come on shore. Duncan M'Brayen answered, to give us time and we would go on shore. When the first shot was fired there were in the 'Star,' myself, John Hamilton, Neil M'Ewan, Hugh M'Farlane, and Archibald M'Ewan. All these, except Hamilton and myself, went into the 'Weatherside.' When the first shot fired we were sitting in the 'Star.' After the first shot was fired John Hamilton and I threw out the net. It took us about one or one and a half minutes to throw the net out. The firing continued about two or three minutes. I cannot say whether it continued after we had thrown the net over. After throwing over the net I tried to haul in the anchor. Some cried to cut the rope. I cut it to get to shore quick. Hamilton and I pulled in the 'Star' quick. We were in before the 'Weatherside.' I did not hear of M'Dougall's death till I got to Achnaba.

Cross-examined for the panels.—I did not see the 'Weatherside' at the shore. One of the men on shore came to the water edge about three yards from our stern. I could not see how he was dressed. I spoke to him. He told us to put in the boat, and we told him to come on board. He said he could not get on board. I told him to go and get his own boat. He then walked down to where the other man was, at the 'Weatherside,' which was about ten yards from us. I don't know whether she was then beached. I shoved off the 'Star,' and made for Achnaba. The 'Weatherside' came there about ten or fifteen minutes after us.

Re-examined for the prosecution.—One of the men on shore had a gun in his hand. I don't think it was the one who spoke to us.

RICHARD ADAMS.—I am a seaman in the 'Jackal.' I left the 'Jackal' one night. About the time the man was killed I was in a boat with three other seamen, an officer, and a marine. The officer was Hawton, and the marine Parker. We sailed in the direction of the Otter Spit. Prisoners landed a good way from the Otter Spit. They took with them a musket, which Parker had. I cannot say how long they were away. It would be between one and three hours. When they returned Hawton desired us to pull up to where the people were. We did so, but the people were gone. He said he was afraid they had hurt some person. He said they had fired a blank shot.

Cross-examined for the panels.—We had our cutlasses. Every thing was as usual.

E. F. LODDER, *Lieutenant, R.N.*—I commanded the 'Jackal' in Lochfyne on the 6th June. I am the Naval Superintendent of Fisheries. Part of the duty is to suppress trawling. On the 6th June I sent out a boat in charge of Hawton, four seamen, and one marine (Parker). No special instructions. There was a revolver in charge of Hawton. The marine had a rifle, and the seamen cutlasses. The revolver is generally loaded with ball. I don't know whether the rifle was loaded. On such expeditions we generally send ten rounds of ball cartridges in charge of the officer in command of the boat. Also it is usual to take blank cartridges for rifle. These are in charge of a marine. Our gunner was away from the ship that evening. I don't know who served out the ammunition. The boat went away about 8 P.M. Hawton reported himself to me at 4 A.M. He said he had an idea that a man had been wounded in a fishing-boat, but he had not seen the man.

Cross-examined for the panels.—I was instructed by the Admiralty to put myself in communication with the Fishery Board. We have a crew of sixty (sailors and marines). Our only duty was to repress trawling. After I superseded Lieutenant Simpson, I ascertained the practice that had been followed, and continued the same practice of sending out at night boats armed, four seamen, a marine, and a warrant officer. The seamen and marine are under order of the warrant officer. The officer has a revolver, the marine a rifle, and the seamen cutlasses. Hawton, the boatswain, was frequently sent in charge of a boat. Parker was frequently sent as a marine on similar service. The blank cartridges were to be used to bring boats to. The object in view was to seize nets. In bringing the boat to, we fire first blank cartridges, and if no attention is paid, fire ball wide of the boat, and if no attention, you would be justified in firing right into the boat. The cartridges were sent that night to be so used. I considered they were entitled to bring to the trawlers' boats, in order to seize nets. The instructions to me were general, to put down trawl-

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ing, and to seize nets. I have been applied to, but declined to allow seamen to be armed with fire-arms. It was perfectly right for the prisoners to land and walk along shore, and it is usual to do so. When the prisoners came opposite the boats believed to be trawling it was Hawton's duty to hail them; then to fire blank cartridges; then ball; just as if they had been in a ship's boat. I am very much satisfied with Hawton's conduct as an officer—of good conduct, attentive to his duty, and understands it, and has good temper. Parker had also a good character, and is acquainted with his duty. It was the marine's duty to act under orders of the boatswain, and to fire only according to order. It would not surprise me that on firing a rifle wide of a boat, the ball should strike some one in the boat. If a ball strikes water it is apt to rebound and go off at an angle. Trawling was frequent in Lochfyne at the time, and I had urgent orders as to putting it down. Hawton has a medal for the Baltic. Parker has medals for the Crimea. Both are excellent men.

Re-examined for the Prosecution.—The four steps I have described for bringing to are the same as used in the navy for bringing to vessels. I don't understand that the 'Jackal' was in Lochfyne to assist the civil powers. My orders were from the Fishing Board. Our object is to seize nets and apprehend the men. At sea, a vessel brought to, either comes to you, or stays where she is till you come to her if you can get at her. I have known previously a boat brought to in Lochfyne by firing ball wide. I know this from the entry in the log-book. On another case a gunner fired ball when violence was threatened.

Re-cross-examined.—When the officers are ashore bringing to, they would require the boats to come to shore.

JOHN HUNTER, *surgeon*.—I made a *post-mortem* examination of the body of Peter M'Dougall on 8th June, along with Mr Campbell and Mr Jackson, surgeons—(Read report)—it is a true report; one continuous wound entering on the right temple, and passing out on the left side of the head. I think the wound was not made by an ordinary pistol bullet—more probably a rifle bullet.

Cross-examined.—Not a revolver bullet. Alexander M'Brayen had no wound of the hand or face—a mark on the hand, but not made by a bullet—a blister—I told him so.

DUGALD CAMPBELL, *surgeon*.—Shown the report. It is true. I think it was not a pistol bullet.

Cross-examined.—Alexander M'Brayen spoke of a wound on his hand; but I examined, and could see nothing.

The prisoners' declarations were then read. The declaration of the boatswain stated :—

That he was thirty-two years of age, and belonged to H.M.S. 'Jackal,' stationed in Lochfyne, with the view of preventing illegal fishing;

that on 6th June the 'Jackal' was lying at anchor, and he was sent out by order of the commanding officer in charge of an armed boat, which contained himself, four seamen, and a marine. Declarant had a revolver of six barrels, three of which were loaded. The marine had his rifle and bayonet, and had ten ball cartridges and several blank charges; and the seamen had their cutlasses. When about a mile or a mile and a half from the 'Jackal,' he thought it better to go on shore with only the marine, to evade the numerous spies of the trawlers. When they had gone some distance, they came upon a party of trawlers in two boats a little out from the shore. They did not show themselves at first, but waited till they got their net on board, and shot it again. Declarant then hailed them, but they spoke to each other in Gaelic, and went on as before. He then ordered the marine to fire blank over the boat. One of the fishermen called out in English, 'I do not know 'who you are,' and his reply was, 'If you come on shore you will 'see.' They said they were coming, but they made no movement towards coming. He therefore ordered the marine to fire a second blank charge over the boat, and he did so. Still the fishermen did not move, and he ordered the marine to load again, and fire wide of the boats, and he did so, but he did not remember if he ordered to load with ball. As the fishermen did not come to, the marine fired a fourth round, but without any special order from him. After this, one of the boats, which had two men, came in shore, but when he went close, they backed out again. The other boat, which had six or seven men in her, rowed along the shore. The marine followed her, and when declarant found that he could not get at the boat with the two men, he followed the marine, but the boat did not come close enough for them to get in. A young man jumped out of the boat and came to them, and another man from the boat called out that one of the party was wounded. He thought this unlikely, but thought if it were true, he had better go and get the skiff, and come to their assistance. While going along the beach, one of the fishermen ran after him, and told him that the fisherman was dead. He thought this might be a decoy to get him out of the way, while they secured their nets, and he went instantly to the skiff, and brought it to the spot as fast as the men could row. When he returned, the boats and fishermen were all gone. After the marine had fired two blank charges, he fired two charges from his revolver wide of the boat which had the two men in it, and he fired a third charge at the other boat between the marine's third and fourth round. These seven charges were all that were fired. He received no special orders to use fire-arms on this occasion; but he knew that it was the practice on Lochfyne to fire not only blank cartridge, but also with ball over and a-stern of the boats, in order to bring them to.

The marine, Parker, made a similar statement of the circumstances. He said:—

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That he was ordered, after twice firing blank without effect, to fire with ball wide of the boat, and did so. The boatswain then told him to load again, and fire a second time wide of the boat that was using the net. After this the boat came a-shore, and two men came out, and one followed the boatswain up the beach. The boatswain said if there was anything wrong, he would get the skiff and come to their assistance; but when they returned with the skiff, men, boats, and nets were all gone.

This closed the case for the prosecution.

EXCULPATORY EVIDENCE.

JOHN MITCHELL FURNEAUX, *boatswain of the 'Jackal'*—I have been above two years boatswain in the 'Jackal,'—first with Lieutenant Murray, then with Lieutenant Simpson, and now with Lieutenant Lodder. The 'Jackal' has been on the west coast about 18 months, for the purpose of putting down trawling. I have gone in boats as warrant-officer in command. I had a revolver and ball cartridge. A marine had a rifle and ball cartridge; the seamen had cutlasses. In absence of the gunner and master, I gave out the ammunition. I did so from the 1st to 6th June in the usual way. I was out on boat service on 5th June, armed as I have described. The ball cartridges are kept in a locker in a boat under charge of the officer in command. The ammunition had been in the boat from 1st June. The reason of taking blank cartridge was to fire to bring to. If not obeyed, ball cartridge is to be fired a-head or a-stern. The marine was under orders of the officer. I have had occasion to fire ball myself to bring to; the arms and ammunition were put into the boat to be used in that way. I have always told Hawton when going away, to hail, and to fire blank, and then to fire ball a-head or a-stern, clear of the boat. They always stopped to me, or I would have fired into them. I have frequently landed to look for trawlers. If then my own boat was at a distance, I would fire into the trawler if she did not stop. I would call to them to come to shore; if they did not obey, I would act as at sea when a boat does not stop. Our boats always went armed when on night duty. When I had occasion to fire blank or ball, I always reported it next morning. I have seen Lieutenant Simpson fire ball cartridge to bring to trawlers. I have known the gunner do so. It is the rule to have a loaded rifle on board for the purpose. I have been 18 years in the navy. I am senior to Hawton. One cannot tell by the sound of a bullet whether it is within eight or ten inches, or eight or ten feet.

Cross-examined.—I have never seen people on shore bring to a boat.

ADMIRAL RAMSAY.—When entitled to search a vessel, and you wish to bring her to, you fire blank to leeward, then a shot a-head, then over,

then at her. In boat service, the rule is much the same. I have done so in regard to smugglers. There is no other rule—no written law. If the case is put as to trawlers? The particular service makes no difference. I would expect the warrant-officer so to act, unless he had contrary orders. Case of part of officers on shore? The same principle. The duty of the boat is to pull to shore. The marine must obey the orders of the warrant-officer. The firing over should be so as to let them hear the whizzing of the ball or bullet.

Cross-examined for the Prosecution.—The practice I have described is according to the custom of nations. I don't know any written law on the subject. I have never seen a case of a person on shore bringing boats to.

EDWARD STACK.—I am gunner in the 'Jackal.' Joined in August 1860. Lieutenant Simpson commanded. Boats sent out at night were armed. An officer, a marine, and four seamen were on board. My duty was to give out ammunition. I have been on boat duty at night against trawlers. I have frequently brought them to, by ordering them to lie on their oars. I have sometimes had to fire blank cartridge a-head or a-stern, or over them, and sometimes a second or a third. I once fired into a trawler in the Kyles of Bute. They sometimes escaped. I have been 13 years in the service, and the custom of the service is what I have described. When Hawton joined, I instructed him in the way I have described. He went with me on duty. It never occurred to me to have to bring to a trawler when I was on shore. I never gave instructions as to that.

FRANCIS SIMPSON.—I am Master of the steamer 'Jackal.' Boats sent out at night were always armed. I have seen Lieutenant Simpson fire ball cartridge to bring to trawlers. Arms can only be taken with authority of commanding officer; the arms are to be used as necessary for bringing boats to. Hawton has a good character, and knows his duty. Parker holds a good character.

This closed the evidence for the defence.

The SOLICITOR-GENERAL, for the prosecution, passed from the charge of murder, but asked a conviction on the charge of culpable homicide. He contended that the matter was purely civil; and that there was no warrant for adopting the practice usual in war for bringing boats to, in putting down trawling in Lochfyne. The offence of fishing with trawling-nets was punishable by fine, 23d and 24th Vict. cap. 92, sects. 3 and 6; and persons contravening the Act might be apprehended by the police, sect. 22. The naval officers were there

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merely to aid the civil authorities. When a person having committed an offence ran away, the business of the officers of the law was to apprehend him ; but in order to do so they were certainly not entitled to fire at him. It was quite out of the question to say that M'Dougall was legally killed. Further, according to the rules of the naval service, the officers were entitled to fire ball only in order to bring the boat to—that was, to make it stop till they should come up to it. Here, certainly, the trawlers were not running away, and could not know that on this particular occasion it was not enough for them to stop where they were, but that they were bound to come a-shore. Neither was it proven that they knew, or could know, that Hawton and Parker belonged to the 'Jackal,' or had any authority to interfere with them. In any view, Hawton and Parker had been hasty and reckless. It was midnight, and dark ; they had fired much too hurriedly ; and while he did not contend that they had meant to fire into the boat, it must be presumed that Parker had not tried to fire very wide of it.

YOUNG, for the panels—The marine merely obeyed the orders of the boatswain. He was absolutely bound to do so, unless he was ordered to do what was obviously a grossly criminal and illegal act. But the boatswain had given no orders of that kind. He had merely ordered the marine to act according to the usual naval practice. The boatswain, in giving the orders, simply acted according to the custom of the service. It might be a question whether the suppressing of trawling was a duty which a Queen's ship should be engaged in ; but if naval officers were sent with a Queen's ship to suppress trawling, they could only act according to the rules of their own service. If a Queen's ship were sent to catch a criminal escaping in a ship, no doubt the naval officer in command would be entitled to bring the ship to, according to the ordinary practice of the service. The trawlers knew very well that Hawton and Parker be-

longed to the 'Jackal,' and that by firing blank they meant to force them to come a-shore. Beyond all question the trawlers were legally bound to obey the signal and to come a-shore. They did not do so, but occupied themselves in sinking their nets. Hawton and Parker had not been reckless. It was not pretended they had fired into the boat, or that they wished to take life.

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The LORD JUSTICE-GENERAL, in charging the Jury said,—A man, when engaged in violation of the law, had lost his life, when there was no legal warrant to take his life. It was not alleged that the prisoners had fired into the boat with the intention of making their shot tell in the boats. The case presented to the Jury was, that the prisoners had fired with the view of compelling the persons in the boat to come to the shore and submit to legal authority, but with the intention that the shot should not take effect in the boats, but pass wide of them. There was no doubt that, on this occasion, the prisoners went out in the performance of their duty, and that they were armed in the usual manner; and also, that the fishermen were at the time engaged in an unlawful occupation; and it was also beyond question that a person in one of these boats had been killed by a shot fired by Parker. The question was, were either of the prisoners responsible?

The prisoners were enlisted in the naval service of the country, and were bound to follow the rules of that service. It was not necessary to discuss how far the employment of persons in the naval service in such a duty as suppressing trawling, imported into that employment the rules of the naval service. But subordinate officers or privates were not persons who were entitled to consider whether the rules to which they had been accustomed were imported into this duty, unless that were explained to them by their superior officers. One of the prisoners in this case had a certain command, the other was in the position of a subordinate; and it was the duty of the subordinate to obey his superior

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officer, unless the order given by his superior was so flagrantly and violently wrong that no citizen could be expected to obey it. But that principle extended also to the other prisoner, the officer then in command, because he was there also as a subordinate to fulfil the duty entrusted to him according to the rules of the service. And, therefore, if, when the prisoners fired the shots with the view of making the fishermen yield to legal authority, they were acting in accordance with the usage of the naval service, they were not guilty of any violation of the law.

But then in doing that it was incumbent on them to take due care of the lives of the fishermen ; their object in firing was not to produce death or injury, but merely to give notice to these persons that they were required to submit to the law ; and they were bound to take care that the shots fired for that purpose were not so carelessly fired as to produce injury or death.

It was for the Jury to consider, firstly, whether the prisoners, in firing first with blank cartridge, and then with ball wide of the boats, had acted in accordance with the rules of the naval service, as their superior officers believed they ought to be practised. And, secondly, whether, if they did so, they took reasonable care that what they did did not produce injury to the persons against whom they were acting. The injury which unfortunately did occur might have been accidental. The shots, however, were fired when it was comparatively dark, under circumstances which might make the firing more dangerous than it would otherwise have been, and therefore the panels should have been more than usually cautious. But, on the other hand, it was not to be presumed that the prisoners fired recklessly or carelessly, unless there were evidence to that effect. His Lordship charged the Jury, that if they were of opinion that the prisoners had acted in accordance with the rules of the naval service, and had not acted carelessly or recklessly, the prisoners were entitled

to an acquittal. If, on the other hand, they were of opinion that they had deviated from the rules of the service, or that, in acting according to the rules of the service, they had failed to use due caution, they were then bound to give a verdict against the prisoners.

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Another ground had been a good deal discussed, viz., whether it made any difference that the prisoners were on shore, and not at sea. Had they been at sea, it would have been their object to stop the progress of the boat endeavouring to make away, so as to be able to seize it. In this case the object plainly was to make the boats come a-shore, because, so long as they remained out at sea they were, in the circumstances, beyond the execution of the law. No exact precedent had been cited ; but the officers under whom the prisoners were serving, and Admiral Ramsay, were of opinion that the only difference in that case from the ordinary case, when both boats were at sea, was, that in the latter case it was only necessary that the boats signalled should be stopped, but, in the latter, that they should be brought to the shore.

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The Jury unanimously returned a verdict of Not Guilty.

The panels were therefore assolizied *simpliciter*, and dismissed from the Bar.

Present,

July 22
1861.

LORDS IVORY, COWAN, AND ARDMILLAN.

HER MAJESTY'S ADVOCATE—*Hector A.D.—W. Ivory A.D.*

AGAINST

MARY MILLAR or OATES—*Muirhead.*

THEFT—PLAGIUM—ABDUCTION OF A CHILD—ALTERNATIVE CHARGE—RELEVANCY—PROCEDURE.—(1.) The crime of plagium may be committed wherever the object of it is a child under puberty; (2.) An indictment charged alternatively with plagium, 'the wicked and felonious abduction from its parents of a female child under the age of puberty,' said to have been effected 'by seducing, and enticing, and inveigling' her to leave her parents, in whose custody she was, without their knowledge or consent. The Court having expressed doubts as to the relevancy of such a charge, it was withdrawn by the prosecutor; (3.) It is plagium to entice and take away a girl, ten years old, from the custody and without the consent of her parents, even though the child go willingly, and the purpose of the person taking her is to employ her as a servant, or although the person taking her may have no intention of appropriating her, but means to restore her to her parents in a day or two; (4.) In plagium it is immaterial whether the child said to have been stolen have been taken away *lucri faciendi causâ* or not; (5.) A panel convicted of the theft of a child sentenced to six months' imprisonment.

No. 10.
Mary Millar
or
Oates.

MARY MILLAR or OATES was indicted and accused :—

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&c.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Theft, particularly that species of theft called Man-stealing or Plagium; As also the wicked and felonious Abduction from its parents of a female Child under the age of puberty, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Mary Millar or Oates are guilty of the crime first above libelled, or of the crime second above libelled, actor, or art and part: IN SO FAR AS, on the 12th day of June 1861, or on one or other of the days of that month, or of May immediately preceding, in or near Cowgate, Edinburgh, you the said Mary Millar or Oates did, wickedly and feloniously, steal and theftuously carry away Mary Ann Carolan, a female child then nine years and nine months old, or thereby, daughter of Bernard Carolan, coal-porter, then and now or lately residing in or near Blackfriars Wynd, High Street of Edin-

burgh, and of Bridget M'Donald or Carolan, his wife, and then in the care and lawful custody and possession of the said Bernard Carolan and Bridget M'Donald or Carolan, or one or other of them, and then and now or lately residing in family with them in or near Blackfriars Wynd aforesaid; and having so stolen the said Mary Ann Carolan, you did carry her away to Easter Duddingston, in the parish of Duddingston, and county of Edinburgh, and the said Mary Ann Carolan was not discovered till on or about 21st June 1861 at or near Easter Duddingston aforesaid, and was then restored to her said parents: OR OTHERWISE, time and place both first above libelled, you the said Mary Millar or Oates did, wickedly and feloniously, abduct and carry away the said Mary Ann Carolan from or out of the custody and possession of her said parents, and this you did without their consent, by seducing and enticing and inveigling the said Mary Ann Carolan, without the knowledge of her said parents, to leave them, and to accompany you to Easter Duddingston aforesaid, you falsely and fraudulently holding out and promising to the said Mary Ann Carolan that you would give her money, and bring her home that night, or falsely and fraudulently making other promises to the said Mary Ann Carolan to the prosecutor unknown, for the purpose of inducing her to leave her said parents and go with you: And the said Mary Ann Carolan having been so abducted, was not discovered till on or about the 21st June 1861 at or near Easter Duddingston aforesaid, and was then restored to her said parents.

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lar or
Oates.

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Plagium,
&c.

MURHEAD, for the panel, objected to the relevancy of both charges in the indictment—1. It appeared on the face of the libel, that the child alleged to have been stolen was a girl of nine years and nine months old. A child of that age could not be the object of plagium. Hume (vol. i. p. 84), limited the crime to 'the away-taking of an *infant* child.' And the principle upon which the taking away of such a child is dealt with as theft, he explained thus: 'For, in this instance, the creature taken, which has no will of its own, is as a *thing* under the care and in the possession of others from whom it is taken; and to whom, without any violence, it may be said, and in common language is said, to belong.' But a child ten years old was not an infant; neither could it be said to be 'a thing having no will of its own.' In the previous cases in which plagium had been libelled, the child said to have been stolen was truly an in-

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fant, except in that of *Margaret Macmillan or Branaghan*, Glasgow, Sept. 1839 (Bell's Notes, p. 26) where the charge of plagium was passed from, and that of *Smith*, 16th July 1829 (Alison, vol. i. p. 630), in which latter case the age of the child was nine. Informations on the relevancy were ordered in that case, but, owing to the flight of the panel, were not proceeded with, so that the point was still an open one.

LORD IVORY.—When do you say that infancy ends ?

MUIRHEAD.—At the age of seven. After that age a child is, in law, considered to have a will of its own, and so to be *capax doli*, responsible for crime, and amenable to justice.

2. The alternative charge of abduction was equally objectionable. The word itself was not a *nomen juris* in the law of Scotland, and was unknown in that of Rome ; it was borrowed from the criminal law of England. The crime of abduction, according to the law of England, consisted in carrying off a minor female *by force*, and with the ulterior object of *marriage or violation of her person*. Unless all that were proved, the crime of abduction was not committed. Now, while the major proposition charged the abduction of a *female* child under the age of *puberty*, it appeared from the minor, that neither was the abduction forcible, nor was there an ulterior unlawful purpose in view. Not only was force not averred, but the consent of the child was, by implication, admitted in the words ' seducing, enticing, and inveigling.' How could that be abduction ? The only place in which Hume mentioned the word was in a paragraph treating ' of forcible abduction and ' marriage,' (Com. vol. i. p. 310). The only case in the books of a charge at all resembling the present was that of *Branaghan*, already referred to (Bell's Notes, p. 26) ; but there the relevancy did not seem to have been discussed. It was a contradiction in terms to speak of the abduction of a child capable of admittedly consenting to go with the alleged abducer ; the charge contained no

avermment that the purpose of the abduction was unlawful or improper. A child of ten years old might herself be placed at the bar on the charge of stealing or carrying away a child under seven ; and if it were proved against her, the law would hold her responsible for her crime, and punish her accordingly. If she had reason enough to be punishable for *taking away* a child from its parents, she had reason enough to judge whether or not she herself ought to *go away* from her own parents, and her consent deprived the taking her away of the quality of criminality.

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HECTOR, for the prosecution—1. The charge of plagium was in the usual form. It is the same as that in the case of *Helen Wade*, Glasgow, October 2. 1844, Broun, vol. ii. p. 288 ; *Marion Rosmond or Skeoch*, Glasgow, Sept. 26. 1855, Irvine, vol. ii. p. 234. It was quite true that in most instances of the charge the theft was of an infant ; but in the case of *Helen Torrence* and *John Waldie*, February 2, 1752 (Maclaurin, 152), the indictment charged ‘ the stealing or away-taking of a living child,’ nine years old. A general interlocutor of relevancy was pronounced, and the panels were convicted of ‘ stealing ‘ the child, and soon thereafter selling and delivering ‘ its body, then dead, to some surgeons,’ and were sentenced to death. In the case of *Aitkenhead*, September 1831 (unreported), in which the indictment was drawn by Lord Ivory, plagium was charged, though the child stolen was ten years old ; and in *Branaghan’s* case, in which also plagium was libelled, the child was eleven.

2. In the alternative charge of abduction the precedents had likewise been followed. The objection stated to that charge was, that the abduction was not averred to have been forcible. In the case of *Aitkenhead*, no doubt, force was libelled ; but there the charge was the forcible abduction of any of the lieges. But in the case of *Branaghan*, the phraseology was almost exactly the same as in the libel under discussion. It was quite unnecessary to libel force or violence where the object of

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the crime was a child under puberty, who had in law no will of her own, and as to whom any taking of her away must be regarded as forcible, though no violence was used. A child under the age of puberty was held incapable of consenting to anything done to its own prejudice.

MUIRHEAD, for the panel.—In the cases of Wade and Skeoch, the children said to have been stolen were respectively three and three and a half years old. Torrence and Waldie was a very peculiar case; for there the child stolen actually became a thing while still in the hands of the men who stole it. The fact that the dead body of the child had soon afterwards been sold by the same persons to some surgeons for dissection, was set forth in the indictment, and no doubt present to the mind of the Court in pronouncing the interlocutor of relevancy. In Aitkenhead in 1831, and Branaghan in 1839, though plagium was libelled, the charge appeared in both cases to have been passed from, upon a plea of guilty of the alternative charge of abduction. The case of Aitkenhead afforded no precedent for this alternative charge of abduction, for there force was expressly libelled. The only precedent the prosecutor could found on was that of Branaghan; but a single indictment, which did not seem to have undergone discussion, could not be said to have settled the law.

LORD COWAN was of opinion that the first objection ought to be repelled. According to his view, it was a fundamental principle of the law of Scotland, that a child under the age of puberty could give no consent to anything done to its injury. He was quite satisfied, though he could not recal them at the moment, that cases of plagium had been tried before him at Circuit, in which the children stolen were above the age of seven. At any rate, the cases of Torrence and Waldie, Aitkenhead and Branaghan, were direct authorities. The indictment in the latter was drawn by the late Lord Handyside, a most careful and well instructed criminal

jurist, who was not likely to have made a mistake in such a matter of principle. With regard to the alternative charge of abduction he had more difficulty ; and he would rather avoid expressing an opinion upon it, unless that were absolutely necessary.

HECTOR, for the prosecution, stated, that it was very desirable the Court would express their opinion on the relevancy of the second charge.

LORD COWAN, if he must give an opinion, was not prepared to say the charge was irrelevant. As at present advised, he thought he could not hold that after the case of Branaghan. But he had great doubts of its utility ; and he would not recommend that it should be followed as a precedent.

LORD ARDMILLAN was of opinion that the objections taken by the panel are very serious indeed ; for they amounted to nothing less than this—that, admitting the panel to have done all that she was accused of, she had committed no crime. He would be infinitely concerned were that a true representation of the state of matters under the law of Scotland ; but in his opinion it was not. He concurred with Lord Cowan that the consent of a child of ten years of age to the theft of itself was of no avail to the person committing the theft, and that a child in pupilarity, equally with one in infancy, was incapable of giving consent to anything done to its own prejudice. The charge of abduction, however, caused him some difficulty. It did not appear to him to raise anything not covered by the charge of plagium. An alternative charge of that sort ought to be avoided ; it could only tend to confusion and possible misapprehension. At the same time, he could not say that it was irrelevant.

LORD IVORY.—As their Lordships seemed to be unanimous, his views could not influence their position. He might state, however, that he quite concurred with them as to the first charge. The case of Torrence and Waldie in 1752 was sufficient precedent without later

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authorities," although he too had an impression that cases had occurred recently on Circuit of theft of children over seven years old. The law recognised no term under puberty at which the consent of a child could change the character of a crime. Thus, not only is it rape to have connexion with a girl under puberty even with her consent, it is also a crime to carry on indecent practices with her, even though she be a party to them. While thus concurring with their Lordships as to the relevancy of the charge of plagium, he dissented from their opinions upon the charge of abduction, and would have been unable to sustain the relevancy without fuller argument.

LORD COWAN.—All the length he went was to express his unwillingness to say the charge was irrelevant, but he had great hesitation; and he would be well pleased to have the question more fully argued, if a decision upon it were necessary.

HECTOR, for the prosecution,—after what had fallen from the Bench, would withdraw the charge of abduction.

The charge of plagium was thereupon found relevant, and the prisoner pleaded not guilty.

It appeared from the evidence that the panel, a woman of twenty-five years of age, whose husband had for ten years been stone-deaf, and who had three young children, was a field-labourer, and resided in the village of Easter Duddingston. She had once or twice mentioned to a neighbour that she intended to get a young girl to take charge of her house and bairns while she was out at work. Her husband worked in a quarry some distance from his house, to which he did not return until late in the evening. While passing along the Cowgate of Edinburgh, on Wednesday the 12th June, about eight o'clock in the evening, the panel accosted four or five young girls, who were talking together, and asked them if they knew where she could get a girl to mind a bairn, two or three miles out of the country. One of them pointed

out Carolan, and said she would go. It appeared that Carolan, who was about ten years old, had previously been in a place, and had told her companion that she wanted to get another. Carolan at first objected, saying she had to mind a little brother. The panel asked her if she had any parents, and she said she had a mother, but that she was out working; whereupon the panel said it did not matter, as, if Carolan would go with her, she (the panel) would come in again on Saturday, and settle with her mother, who would be quite pleased to get the money. A difficulty about clothes was got over in the same way; and eventually Carolan went away with the panel, quite willingly, and apparently well pleased. Carolan deponed, that on the way to Duddingston, she frequently expressed a wish to return, but was told by the panel to hold her tongue, that her mother would be quite pleased, &c., and that on reaching Duddingston, the panel went into a neighbour's house for her children, whom she took with her to her own. She further deponed, that next morning the panel made her take charge of the bairn, notwithstanding her complaints; and that the panel always locked the house door in going out, so as to prevent her running away. Neighbours of the panel, however, deponed, that they had never seen the door locked; that Carolan was always going about the doors with the children; that she had been two or three times to Joppa and Fisherrow on messages alone; that she went every morning for water to a well at the head of the village, from which Edinburgh was visible; that she never made any complaints of being detained against her will, but, on the contrary, seemed always romping and happy. The panel was apprehended in her own house in the middle of the night on the 21st and 22d June, when she explained to the officer that she had been unable to get to Edinburgh on the previous Saturday, according to promise; but that she intended to go to town the next day (Saturday)

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to settle with the girl's mother. She repeated the same statement in her declaration.

HECTOR, for the prosecution, asked a verdict on the charge of plagium.

MUIRHEAD, for the panel, said—There could be no doubt the panel had taken away the girl without the consent of her parents. In so doing she had been guilty of a very grave indiscretion. What was charged against her, however, was the theft of the child ; and it was for the jury to consider whether, straining the evidence to the very utmost, it would support such a charge. To warrant a verdict of guilty, they must be satisfied that the panel took the girl away with a felonious and theftuous purpose, intending to appropriate her—in other words, to retain her and make use of her as if she were a child of her own. They must be satisfied, too, that the child was taken away for the sake of making gain of her. These were two necessary ingredients of the crime of child-stealing ; yet, in the present case, both were absent. For it appeared clearly from the evidence that the taking of the girl was with the perfectly honest purpose of employing her as a servant, paying her wages for her service ; and there could be little doubt that had the panel had an opportunity of settling with the girl's mother, and the latter had expressed any objection to her daughter's absence, the latter would at once have been sent home.

LORD IVORY, in charging the Jury, said—The case was a very simple one upon the evidence ; but the statement of the law suggested for the panel was erroneous. It was of no consequence whether or not the panel meant to restore the child to her parents in a few days or weeks or not ; that she did not mean to retain her as if she were her own. It was not a man's ultimate intention, but his present act, that was to be considered. Thus, in the case of Dr Dodd, when he committed the forgery for which he was executed, he entertained the confident belief that before it could be

brought to light, he would be able to replace, as in fact he did, the money which he had raised by means of it, and so no one would ultimately be defrauded ; yet that was considered no good defence. And the same principle had over and over again been given effect to in cases of theft, where the plea now maintained for the panel had been set up without success. Nor did it matter at all whether the panel meant directly to make pecuniary gain of the child. If she had hired the girl out to one of her neighbours, and put the money in her own pocket which she received for the girl's services, what difference in principle would there have been between that and the present case ? She substantially made gain of her by employing her as a servant ; for there was no proof, save her own assertion, that she had ever any intention of giving the girl wages for her services, were that of any importance. These considerations were of no weight whatever. All that was to be considered was the *amotio*,—the original taking away. If the Jury were satisfied that the child was carried or enticed away from the custody of her parents, to whom she might be said to belong, and without their knowledge or consent, then they must find the prisoner guilty of *plagium*.

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The Jury returned a verdict of guilty as libelled.

Sentence in the circumstances of the case, six months' imprisonment.

NORTH CIRCUIT.

PERTH.

Sept. 11.
1861.

Judges—LORDS DEAS AND NEAVES.

ELIZABETH BAXTER, Appellant—*Scott*.

AGAINST

WILLIAM KENNEDY, Respondent—*Thoms*.

APPEAL TO CIRCUIT COURT—PROCESS—SMALL DEBT DECREE—PROOF
—1 VICT. C. 41.—An appeal to the Circuit Court of Justiciary
against a small debt decree *dismissed*, in respect the appellant pro-
duced no certified copy of the decree, or proof that it had been pro-
nounced.

No. 11.
Baxter v.
Kennedy.

Perth.
Sept. 11.
1861.

Appeal.

IN an appeal to the Circuit Court of Justiciary at
Perth, against a small debt decree, pronounced by the
Sheriff-substitute of Forfarshire,

THOMS, for the respondent, argued that there was no
process, no certified copy or other evidence of the de-
cree having been produced.

SCOTT, for the Appellant—The decree was in the re-
spondent's favour; he only was entitled to an extract
of it, and he was the party who should have produced
it. By 13th section of the Small Debt Act, 1 Vict. c.
41, the decree had to be appended to the summons;
and by the 17th section, it, with other decrees, had to
be entered in a book by the Sheriff-clerk. He, *quoad*
this process, was the clerk of the Court of Appeal also;
and therefore the decree was already *in manibus curiæ*.

LORD DEAS thought the copy of the decree in the
books was not equivalent to the decree, being merely a
memorandum of the judgment; but it was not necessary
to decide that. The decree itself was, under section 13
of the Act, annexed to the summons, in the form of
schedule A of the Act, and that decree, on being signed

by the clerk, was declared to be a warrant for diligence. There was no evidence before the Court that any such decree had been pronounced as the Court were asked to review. For anything that appeared, the decree of the Sheriff-substitute might have been in favour of the appellant. There was, therefore, no need to go further with the case.

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LORD NEAVES had a strong impression that the book was not the final decree, but that the Court were not called on to decide. His Lordship concurred with Lord Deas.

The Court accordingly dismissed the appeal.

J. D. GRANT, Writer, Dundee—REITH & LEES, Writers, Dundee—Agents.

INVERNESS.

Sept. 24.
1861.

Autumn 1861.

Judge—LORD NEAVES.

HER MAJESTY'S ADVOCATE—*Maitland-Heriot, A.D.*

AGAINST

ANGUS MACPHERSON AND JOHN STEWART—*A. Nicolson.*

No. 1.2
Angus
MacPherson
and
John Stewart.

CULPABLE HOMICIDE—INDICTMENT—RELEVANCY—*Modus.*—An Objection to the relevancy of an indictment, charging culpable homicide by running down a fishing-boat, whereby three parties in the same were drowned; that the libel was too general, and did not sufficiently specify wherein the culpability consisted—repelled.

Inverness.
Sept. 24.
1861.

Culpable
Homicide.

ANGUS MACPHERSON and JOHN STEWART, both boatmen, were charged with the crime of Culpable Homicide:—

IN SO FAR AS, time after libelled, you the said Angus MacPherson and John Stewart being in a smack or sloop-rigged boat or other boat, the property of Finlay Mackenzie, boat-builder, now or lately residing in Portree in the parish of Portree, and shire of Inverness, or being

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the property of you the said Angus MacPherson and John Stewart, or of one or other of you, or of some other person to the prosecutor unknown, the said smack or boat being under the charge of you the said Angus MacPherson and John Stewart, or one or other of you, and proceeding under sail from or from near Sconser, in the parish of Portree aforesaid, to or towards Portree aforesaid, or proceeding northwards in or near the Sound of Raasay after libelled, you the said Angus MacPherson and John Stewart did, both and each, or one or other of you, on the night of the 3d, or morning of the 4th, day of July 1861, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near the Sound of Raasay, situated between the islands of Skye and Raasay, all in the shire of Inverness aforesaid, and at or near a part of the same situated about half-a-mile, or other short distance, in a south-westerly or southerly or westerly direction, from a place known or called by the name of Skeir Crapach or Skeir Oskaig, or at or near some other part of the said Sound of Raasay, the particular place being to the prosecutor unknown, navigate, direct, manage, or steer, the said smack or boat in a culpable, negligent, and reckless manner, and without due regard to the safety of persons in other boats fishing or otherwise engaged in or near the said Sound of Raasay, and in consequence thereof did cause or permit the said smack or boat under your charge as aforesaid, or some part of it, or something connected with it, to come against, run down, and sink a fishing-boat or other boat, the property of John Finlayson, fisherman, then or lately before residing at or near Balmeanach, in the parish of Portree, and shire aforesaid, or of some other person to the prosecutor unknown, then lying in or near said Sound, having attached thereto a train or number of herring-nets shot or placed in or near said Sound; by all which, or part thereof, the said John Finlayson, and Donald Finlayson and Alexander Finlayson, both fishermen, then or lately before residing at or near Balmeanach aforesaid, being at the time in said fishing-boat or other boat engaged in fishing, or otherwise engaged, were, all and each or one or more of them, then and there immersed in the water in or near said Sound, and drowned and bereaved of life, and the said John Finlayson, Donald Finlayson, and Alexander Finlayson, or one or more of them, were thus culpably killed by you the said Angus MacPherson and John Stewart, or one or other of you.

NICOLSON, for the panels, objected to the relevancy of the libel, that the indictment contained no specification of the mode or manner in which the offence was committed; that it was too vague, and did not contain any precise statement showing wherein the culpability consisted. In housebreaking, it was necessary to state the

modus, as that the windows had been forced open, or the door picked, and in assaults it was necessary to state how they were committed, as by using a knife, a bludgeon, or the fist, &c. The libel here should state that the boat under charge of the panels was going too fast, or that there was no look-out kept, or such other particular, showing wherein the recklessness consisted. See case of *Ezekiel M'Haffie*, High Court of Admiralty, Nov. 26, 1827. Syme's Justiciary Cases, App. No. iii.

No. 12.
Angus
MacPherson and
John Stewart.
art.
Inverness.
Sept. 24.
1861.
Culpable
Homicide.

The ADVOCATE-DEPUTE replied, that Alison, vol. i. p. 627, states this offence as being the same as culpable or reckless driving on shore. This libel, though somewhat new, was framed on similar principles as such cases of culpable or reckless driving on land, referred to various cases, and that if it were to be held that a specification such as was pointed at must be given, it might be impossible to try such a case when the offence is committed in the middle of the night on the sea, and where no one was very near but the three parties who were drowned, and the two accused parties at the bar.

LORD NEAVES.—Every case depends on its own circumstances. It is stated in this libel, that the boat under the charge of the panels was in motion, proceeding under sail, and that the other boat was at rest. The two did not come into mutual collision, when it might have been necessary to give such a specification as to show which of the two boats was culpably managed or steered. The presumption must be, I should think, that any other boat that comes in contact with a stationary boat is culpably managed or steered. If the facts as stated are proved, I should think that you in charge of the steering and moving vessel are to blame. The case is quite analogous to that of culpable and reckless or furious driving on shore, and this libel is framed in accordance with the usual style of such libels. On this very circuit at Aberdeen, we had a case of *Watt* charged with culpable and reckless and furious driving, who pleaded guilty to the charge of culpable and reckless

No. 12.
 Angus
 MacPherson
 and
 John Stewart.
 art.
 Inverness.
 Sept. 24.
 1861.
 Culpable
 Homicide.

driving, and not to furious driving, which last might be said to contain the specification of the offence. If a vessel is moored, any other vessel that comes up must keep clear, and is responsible for any collision that takes place.

The objection was repelled, and the indictment found relevant.

Thereafter, Angus MacPherson pleaded guilty, and John Stewart pleaded not guilty, which pleas were accepted by the Advocate-Depute.

The Court sentenced MacPherson to three months' imprisonment.

Judge—LORD NEAVES.

HER MAJESTY'S ADVOCATE—*Maitland-Heriot, A.D.*

AGAINST

ALEXANDER M'KAY—*A. Nicolson.*

INDICTMENT—POST-OFFICE OFFENCES—1ST VICT., c. 36, SECT. 27, 28—
 RELEVANCY.—Held competent to libel on a contravention of the 27th section of the statute, charging the theft of a post-letter, in addition to a contravention of the 28th section, charging the stealing a post-letter from a post-letter bag.

No. 13.
 Alexander
 M'Kay.
 Inverness.
 Sept. 24.
 1861.

ALEXANDER MACKAY, prisoner in the prison of Dingwall was indicted and accused,—

THAT ALBEIT, by an Act passed in the first year of the reign of Her present Majesty Queen Victoria, chapter thirty-sixth, intituled, 'An Act for consolidating the laws relative to offences against the Post-Office of the United Kingdom, and for regulating the judicial administration of the Post-Office laws, and for explaining certain terms and expressions employed in those laws,' it is enacted, by section twenty-seventh, 'That every person who shall steal from or out of a post-letter any chattel or money or valuable security, shall in England and Ireland be guilty of felony, and in Scotland of a high crime

‘ and offence, and shall be transported beyond the seas for life :’ And by section 28th, it is enacted, ‘ That every person who shall steal a post-letter bag, or a post-letter from a post-letter bag, or shall steal a post-letter from a Post-Office, or from an officer of the Post-Office, or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life :’ And by section forty-first of the said Act, it is enacted, ‘ That every person convicted of any offence for which the punishment of transportation for life is herein awarded, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years :’ AND ALBERT, by the laws of this and of every other well-governed realm, Theft is a crime of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, that you the said Alexander M‘Kay are guilty of the high crime and offence set forth in the said 27th section of the said statute above libelled, and of the high crime and offence of stealing a post-letter from a post-letter bag, set forth in the said twenty-eighth section of the said statute above libelled, or of one or other of the said high crimes and offences, actor, or art and part, or, as alternative to the said two charges above libelled, of the said crime of theft at common law, actor, or art and part : IN SO FAR AS (1.), on the 16th, 17th, 18th, or 19th day of February 1861, or on one or other of the days of that month, or of January immediately preceding, or of March immediately following, within or near the post-office at Aultbea, in the parish of Gairloch, and county of Ross, then and now or lately occupied by William Mackay, postmaster, now or lately residing at Teanaflin, in the said parish and county, you the said Alexander Mackay did, wickedly and feloniously, open a post-letter bag, being the post-letter bag, or a post-letter bag, between Stornoway, in the parish of Stornoway, and in the island of Lewis, and county of Ross, and Dingwall, in the said county of Ross, and did, wickedly and feloniously, steal and theftuously away take therefrom a post-letter, having thereon, or on the envelope or cover thereof, the following or a similar address :—

‘ Money order Remittance
 ‘ Harris
 ‘ Francis Abbott Esq
 ‘ For the Accountant
 ‘ General Post Office
 ‘ Edinburgh,’

the property, or in the lawful possession, of Her Majesty’s Postmaster-General, which letter then contained sixteen bank or banker’s notes for £1 sterling each, or thereby, and £3 sterling in silver money, or

No. 13.
 Alexander
 M‘Kay.

Inverness.
 Sept. 24.
 1861.

Contraven.
 1st Vict., c.
 36, § 27, 28.

No. 13. thereby, the property, or in the lawful possession, of Her Majesty's
 Alexander M'Kay. Postmaster-General: FURTHER (2.), time and place above libelled,
 you the said Alexander Mackay did, wickedly and feloniously, steal and
 Inverness. Sept. 24. 1861. theftuously away take, from or out of the post-letter above libelled, the
 Contraven. 1st Vict., c. 36, § 27, 28. sixteen bank or banker's notes for £1 sterling each and £3 sterling in
 silver money, above libelled, or thereby, the property, or in the lawful
 possession, of Her Majesty's Postmaster-General: OR OTHERWISE
 (3.), as alternative to the said two charges above libelled, you the said
 Alexander M'Kay did, time and place above libelled, wickedly and
 feloniously, steal and theftuously away take, from or out of the post-
 letter bag above libelled, the letter above libelled, the sixteen bank or
 banker's notes for one pound sterling each above libelled, for part
 thereof, and the three pounds sterling in silver money above libelled,
 or part thereof, all the property, or in the lawful possession, of Her
 Majesty's Postmaster-General, or the property of Roderick Mackay,
 then and now or lately sub-postmaster, or now or lately shopkeeper,
 at Tarbert, in the parish of Harris, and county of Inverness, or of
 Francis Abbott, Edinburgh, or of one or more of them.

NICOLSON objected to the relevancy of the indictment, in respect that it charged the panel not merely with stealing the letter from the post-bag, but also with stealing the letter and contents; that it was incompetent to charge the panel for two offences for stealing one letter; that no similar case existed.

The ADVOCATE-DEPUTE answered, that he was not aware of any similar case, but that the two offences were different and distinct; the one charged the panel with tampering with, opening a post letter-bag, and stealing a letter from the same; the other, with thereafter opening the letter, and stealing the contents of the letter.

LORD NEAVES.—There are two offences charged, the one a contravention of the 27th section, and also of the 28th. The minor charge reverses the order of the charges, but that does not affect the question at issue. It seems to me that the libel, and the mode of stating the offence, is strictly logical and correct. If the panel opened the letter-bag and removed the letter an inch, he committed the one offence. If he then opens the

letter, and takes away the money, he commits the other.

The objection was repelled, and the indictment found relevant.

Thereafter the panel pleaded guilty to the two first charges, and was sentenced to four years Penal Servitude.

No. 13.
Alexander
M'Kay.

Inverness.
Sept 24.
1861.

Contraven.
1st Vict., c.
36, § 27, 38.

HER MAJESTY'S ADVOCATE—*Maitland-Heriot A.D.*

Sept. 25.
1861.

AGAINST

ALEXANDRINA OR LEXY CLARK AND JANE M'KAY.—*W. A. Brown.*

CHILD-MURDER—INDICTMENT—RELEVANCY—*Modus*.—In a charge of child-murder, after a specific description of the *modus*, was an alternative statement, 'or did in some other way to the prosecutor 'unknown, maltreat the said child.' Objection to these words as not sufficiently specific, repelled.

ALEXANDRINA OR LEXY CLARK and JANE M'KAY were charged with the crime of Child-murder:—

IN SO FAR AS, on the 13th or 14th day of May 1861, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, within or near the house at Mid Clyth, in the parish of Latheron, and shire of Caithness, then occupied by you the said Alexandrina or Lexy Clark, you the said Alexandrina or Lexy Clark, having been delivered of a living male child, you the said Alexandrina or Lexy Clark and Jane M'Kay did, both and each or one or other of you, immediately or soon after the birth of the said child, then and there, wickedly and feloniously, attack and assault the said child, and did compress or cover up its mouth and nostrils with your hands, or with some other article or substance to the prosecutor unknown, obstruct its breathing, and did choke or suffocate the said child, or did in some other way to the prosecutor unknown, maltreat the said child, by all which, or part thereof, you the said Alexandrina or Lexy Clark and Jane M'Kay did, both and each or one or other of you, bereave the said child of life, and the said child was thus murdered by you the said Alexandrina or Lexy Clark and Jane M'Kay, or one or other of you.

No. 14.
Alexandrina or Lexy
Clark and
Jane
M'Kay.

Inverness.
Sept. 25.
1861.

Child
Murder.

No. 14.
Alexandrina or Lexy
Clark and
Jane
M'Kay.
Inverness.
Sept. 25.
1861.
Child
Murder.

BROWN, for the panel, objected to the relevancy. The indictment sets forth the mode of the death, and then proceeds with such general words as would permit the prosecutor to state any other mode of violence, and referred to case of *Ann M'Que*, High Court, Feb. 20, 1860, Irvine, vol. iii. p. 532.

MAITLAND-HERIOT, for the prosecution, answered,—The words objected were inserted on the suggestion of the Lord Justice-Clerk Hope, in the case of *Mary Wood*, High Court, Nov. 7, 1856, Irvine, vol. ii. p. 497, and are intended to cover any slight variation in the manner of committing the kind of murder stated. He referred to the indictment sustained in *M'Que's* case, March 12, 1860, Irvine, vol. iii. p. 578, which takes a much wider latitude than is taken here.

LORD NEAVES repelled the objection. The prosecutor must confine himself to the kind of murder stated by choking or suffocation. If he proceeded to prove a murder by cutting the child's throat, that might not be allowed under this libel ; and at any rate, the prosecutor, if he proceeded to prove that by his own witnesses, could not say that was a mode 'to the prosecutor unknown.'

The objection was repelled, and the indictment found relevant.

The prisoners both pleaded not guilty. After a lengthened trial, the Jury found Alexandrina or Lexy Clark guilty of culpable homicide, and Jane M'Kay not guilty.

Thereafter the Court sentenced Alexandrina or Lexy Clark to three years' penal servitude.

WEST CIRCUIT.

GLASGOW.

Sept. 25.
1861.*Judge*—THE LORD JUSTICE-CLERK.HER MAJESTY'S ADVOCATE,—*Shand A. D.*

AGAINST

DONALD TURNER—*John Morison.*

PANEL—DEAF AND DUMB—PROCEDURE.—Procedure adopted where a panel was deaf and dumb.

DONALD TURNER was charged with the crime of Theft, especially when committed by a person who has been previously convicted of theft.

The panel being deaf and dumb, the procedure was as follows :—

No. 18.
Donald
Turner.

Glasgow.
Sept. 25.
1861.

Theft, &c.

James Laurie, a teacher of the Deaf and Dumb Institution, was sworn, and deponed, I have been a teacher in the institution for eleven years: I am familiar with the mode of communicating with such persons as the panel by the language of signs. I know the panel—he was a pupil in the institution. I had no difficulty in communicating with him at that time, and shall have no difficulty in explaining to him the questions which the Court may wish to put to him. The panel is a very intelligent person,—he can read and write.

At the desire of the Court, the interpreter explained to the panel that he was charged with stealing the articles libelled, at the time and place set forth in the indictment, and that he had been previously convicted of theft. The interpreter was also desired to ask the panel, whether or not he pleaded guilty to the charge.

The interpreter reported that he had done so, and that the panel pleaded guilty.

It was then explained to the panel through the interpreter, that he must sign the confession, and he

No. 15. having done so, it was similarly explained to him that
 Donald the sentence of the Court was fifteen months' imprison-
 Turner. ment, and that it proceeded on his confession of guilt,
 Glasgow. and on the previous conviction.¹
 Sept. 25.
 1861.
 Theft, &c.

Judge—LORD IVORY.

HER MAJESTY'S ADVOCATE—*Moncrieff A.D.*

AGAINST

ROBERT PATTISON—*Millar.*

PROCESS—INSANITY—MEDICAL WITNESS.—Procedure to be followed in a criminal case when medical witnesses, who have been permitted to remain in Court to hear the evidence on a plea of insanity, desire questions to be put to the other witnesses in the course of examination.

No. 16. COUNSEL for the panel, who was accused of murder,
 Robert pleaded that he was insane at the time of the offence.
 Pattison.
 Glasgow. On the motion of the Crown, and with the consent of
 Sept. 26. the panel's counsel, the medical witnesses on both sides
 1861. were permitted to remain in Court to hear the non-medical
 Murder testimony.

At the conclusion of the examination of one of the witnesses for the Crown, a medical witness for the defence suggested to the Court an additional question which he wished to be put.

LORD IVORY (after consulting with the Lord Justice-Clenk), said—That this was a novelty, and that it would be an inconvenient mode of procedure, if the medical witnesses, who were permitted to be present to hear

¹ The authorities referred to as regulating procedure in such cases, were *Campbell or Bruce*, 1817, Hume, vol. i. p. 45, note; *Hugh Ross*, 1818, Hume, vol. ii. p. 278, note; *David Smith*, 1841, Bell's Notes to Hume, p. 231, Swinton, vol. ii. p. 547.

only, were publicly to take part in the proceedings ; and that, if any of them desired a question to be put, the proper course would be for the medical man to communicate it to the counsel for the party summoning him, who might then adopt it as his own question if he thought proper.

No. 16.
Robert
Pattison.
Glasgow.
Sept 26.
1861.
Murder.

Judges—THE LORD JUSTICE-CLERK AND LORD IVORY.

HER MAJESTY'S ADVOCATE—*Shand A. D.*

AGAINST

PATRICK ANDERSON—*Hamilton.*

WILFUL FIRE-RAISING—ATTEMPT TO COMMIT WILFUL FIRE-RAISING
—INDICTMENT—RELEVANCY.—Objection to the relevancy of an indictment for wilful fire-raising, or attempt to commit wilful fire-raising, in so far as it charged the burning of certain moveables—*repelled*, on the ground that the burning of these was merely set forth as part of the narrative.

PATRICK ANDERSON was indicted and accused :—

THAT ALBEIT, by the laws of this and of every other well-governed realm, Wilful Fire-raising ; as also, Attempt to Commit Wilful Fire-raising, are crimes of an heinous nature, and severely punishable : YET TRUE IT IS AND OF VERITY, that you the said Patrick Anderson are guilty of the said crime of wilful fire-raising, or of the said crime of attempt to commit wilful fire-raising, actor, or art and part : IN SO FAR AS, on the 19th day of May 1861, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, in or near the house or premises called or known as the House of Refuge or Reformatory Institution, situated in or near Duke Street of Glasgow, in the Barony parish of Glasgow, and shire of Lanark, in which you were then detained, you the said Patrick Anderson did, wilfully, wickedly, and feloniously, set fire to the said house or premises, by applying a lighted match or matches, or piece or pieces of burning paper, or some other lighted or ignited substance or substances to the prosecutor unknown, to two or one or more mattresses in each of the two separate wards or apartments of the said house or premises called Ward No. 15 and Ward

No. 17.
Patrick
Anderson.
Glasgow.
Oct. 1.
1861.
Wilful
Fire-raising.

No. 17. Patrick Anderson. Glasgow. Oct. 1. 1861. Wilful Fire-raising.

No. 11 respectively, by which the said mattresses, or one or more of them, were set on fire, and did throw or place the said mattresses, or one or more of them, while burning, against or in contact with the wooden lining of the walls and the flooring in said respective wards or apartments, and the fire thus, or otherwise to the prosecutor unknown, wilfully, wickedly, and feloniously set or applied did take effect, and did burn or destroy [five or thereby beds or mattresses, a blanket, sheet, and bed-mat, and also] part of the said wooden lining of the said walls and part of the flooring of the said respective wards or apartments, [as also a wooden seat or form affixed to the wall in the said ward or apartment called Ward No. 15], or part thereof, all the property, or in the lawful possession, of the Commissioners appointed by the Magistrates and Council of Glasgow, under the Act 17th and 18th Vict. chap. 86, for repressing juvenile delinquency in that city; and the said fire was thereafter discovered, and by the exertions of well-disposed persons subdued and extinguished: OR OTHERWISE, time and place above libelled, you the said Patrick Anderson did, wilfully, wickedly and feloniously, attempt to set fire to said house or premises, by applying a lighted match or matches, or piece or pieces of burning paper, or some other lighted or ignited substance or substances to the prosecutor unknown, to two or one or more mattresses in each of the two separate wards or apartments of said house or premises above libelled, by which the said mattresses, or one or more of them, were set on fire, and did throw or place the said mattresses, or one or more of them, while burning, against or in contact with the wooden lining of the walls and the flooring of said respective wards or apartments, and you did thus, or in some other manner to the prosecutor unknown, wilfully, wickedly, and feloniously attempt to set fire to said house or premises.

HAMILTON, for the panel, objected to the relevancy of the indictment, in so far as it charged the panel with fire-raising, in burning and setting fire to moveables, the indictment specifying 'five or thereby beds or mattresses, a blanket, sheet, and bed-mat;' as also, 'a wooden seat or form, &c., affixed to the wall in said ward or apartment called Ward No. 15.' He referred to Hume, vol. i. p. 131.

The LORD JUSTICE-CLERK did not call on the counsel for the prosecution to reply. He held that these were merely parts of the description of the *modus*. The important part of the libel charges the panel with setting fire to the premises, and all that is said about bedding and mat-

tresses, and other things, is merely intended to show the way in which the fire-raising was committed.

The objection was repelled, and the panel pleaded Guilty of the attempt to commit wilful fire-raising as libelled.

No. 17.
Patrick
Anderson.

Glasgow.
Oct. 1.
1861.

Wilful
Fire-raising.

Sentence.—Eighteen months' imprisonment.

Judges—LORDS JUSTICE-CLERK AND IVORY.

HER MAJESTY'S ADVOCATE—*Moncrieff A.D.*

AGAINST

JAMES M'KAY and JOHN BROADLY—*J. C. Smith.*

PROCESS—DIET—INDICTMENT.—Two panels were indicted for a Circuit Court to be holden at Glasgow 'in the month of September.' They were cited for the 27th of that month, and the diets were afterwards continued from day to day till the 2d of October, when they were tried and found guilty. Objection to sentence passing, that the prescribed time for holding the Court had expired, —*repelled.*

THE panels, who were accused of theft, or otherwise of reset, at first pleaded not guilty, but, after the trial had proceeded some time, they withdrew their plea, and pleaded guilty of reset. The Advocate-depute accepted the plea, whereupon the jury returned a verdict of guilty of reset as libelled. The Advocate-depute, who had withdrawn the charge of theft, then moved for sentence.

No. 18.
James
M'Kay and
John
Broadly.

Glasgow.
Oct. 2.
1861.

Theft or
Reset.

The panels' counsel objected to any sentence following. The indictment provided for punishment following only in the event of the offences 'being found proven' by the verdict of an assize, or admitted by the judicial confession of the panels before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners

No. 18. ' of Justiciary, in a Circuit Court of Justiciary to be
 James ' holden by them, or by any one or more of their num-
 M'Kay and ' ber, within the burgh of Glasgow, *in the month of*
 John ' *September, in this present year 1861.*' Now this was
 Broadly. the 2d of October, and the time for awarding punish-
 Glasgow. ment under the indictment was therefore past.
 Oct. 2.
 1861.
 Theft or
 Reset.

The ADVOCATE-DEPUTE replied, that the panels had been cited to a Court to be held on the 27th of September, and that the diets against them had been adjourned from day to day in the usual manner.

The LORD JUSTICE-CLERK.—I was anxious to hear the argument, more from the important consequences which it involved, than because I had any doubt on the point. The question is in the construction of words. What does the Circuit to be holden in September mean? To explain this we must go to the Act of Adjournal, which appointed this Court to be held on Tuesday 24th September. This was the Court at which the prisoner was indicted. There is an inherent power of adjournment in this as in every Court. The Court was duly constituted on 24th September, and it has since been adjourned from day to day. On 30th September, Lord Ivory, adjourned the Court to 1st October. He adjourned in this way the Circuit Court of 24th September, and whole remaining diets—that is to say, all appointed to be tried at the Circuit. The effect of that was to continue everything from September into October. It is not the practice to insert ' continuation ' of days' in the citation or execution of indictments. The panel was duly cited before the Court, and the Court continued the diet against him.

LORD IVORY.—I concur in what has fallen from the Lord Justice-Clerk. I think the mistake of the panels' counsel arises from the reading of the word Court. The Court is a Court to be holden on a particular day, and on that day to follow the usual course of adjournment from day to day. The Court means the whole Circuit-ayre. The prisoner would not, however, have derived

any benefit from this objection being sustained, as the effect would have been to render the whole proceedings in the trial null from the beginning.

The Court repelled the objection.

The panels' were then sentenced to two years' imprisonment each, the first six months with hard labour.¹

No. 18.
James
M'Kay and
John
Broadly.
Glasgow.
Oct. 2,
1861.
Theft or
Reset.

Judges—LORD JUSTICE-CLERK AND LORD IVORY,

HER MAJESTY'S ADVOCATE—*Shand A.D.—Cowan.*

AGAINST

DANIEL FRASER—*Maclean—Bannatyne.*

MURDER—INDICTMENT—RELEVANCY—*Locus*.—Objection to the latitude taken in specification of *locus* in a charge of murder—sustained.

DANIEL FRASER was indicted and accused,—

No. 19.
Daniel
Fraser.

THAT ALBEIT, by the laws of this and of every other well-governed realm, MURDER is a crime of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Daniel Fraser are guilty of the said crime, actor, or art and part: IN SO FAR AS, on the 14th day of April 1861, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, in or near the Meuse Lane or Muse Lane leading from West Milton Street to Stewart Street of Glasgow, or in or near Stirling Street of Glasgow, or in or near a close or court situated in or near said Meuse Lane or Muse Lane, and leading therefrom to Stirling Street aforesaid, the particular place being to the prosecutor unknown, [or elsewhere in or near Glasgow to the prosecutor unknown,] you the said Daniel Fraser did, wickedly and feloniously, attack and assault the now deceased Patrick M'Kenney, iron-moulder, then or lately before residing with James Connoway, quarryman, in or near Maitland Street of Cowcaddens, in or near Glasgow, and did with a knife, or with some other sharp and cutting instrument to the prosecutor un-

Glasgow.
Sept. 26,
1861.
Murder.

¹ See the case of *Mary M'Farlane or Taylor*, Glasgow, May 1. 1853, Broun, vol. i. p. 550.

No. 19. Daniel Fraser.
 Glasgow.
 Sept. 26.
 1861.
 Murder.

known, stab or cut the said Patrick M'Kenney one or more times on or near the breast or side, whereby he was mortally wounded, and immediately or soon thereafter died, and was thus murdered by you the said Daniel Fraser.

BANNATYNE, for the panel, objected to the relevancy of the indictment, in respect too great latitude was taken in libelling the *locus delicti*, by the introduction of the alternative, 'or elsewhere, in or near Glasgow, to the 'prosecutor unknown.' In support of the objection, it was urged that, had this been a case in which a defence of *alibi* was to have been set up, it might have been found impossible to frame such to meet the indictment. 'In Glasgow' was too general a description of *locus* in a criminal libel,—'near Glasgow' was no definition at all. The words objected to ought, therefore, to be struck out.

SHAND, for the prosecution, replied, that such a general alternative as was here objected to, superadded to a more particular statement of *locus*, was sanctioned by practice, and referred to the case of *Margaret Hannah*, High Court, Dec. 17, 1860, Irvine, vol. iii. p. 635, and authorities there cited.

MACLEAN, in reply, distinguished a case of homicide from one of child-murder, under which latter class all the cases referred to fell. The discovery of the body of a murdered child in a particular place did not necessarily point to that as the *locus* of the murder. The body might have been transported thither after death. Besides, in the present case, the deceased was said to have died immediately, or soon after the infliction of the wound.

The Court sustained the objection, and the words were deleted from the indictment.

HIGH COURT.

Nov. 18.
1861.

Present,

THE LORD JUSTICE-CLERK,

LORDS ARDMULLAN AND NEAVES.

ARCHIBALD DOUGALL, Suspendor—*G. Young—J. C. Smith.*

AGAINST

THOMAS DYKES and JAMES ALSTON DYKES, Respondent—*W. Ivory.*

SUSPENSION—BREACH OF THE PEACE—CHURCH—PROCESS—LIBEL—RELEVANCY.—A libel *sustained* as relevant which charged a breach of the peace, especially when committed wilfully and maliciously, on the Sabbath-day, in a church, in presence of the minister and congregation, during divine worship; as also the wickedly, wilfully, and maliciously disturbing and annoying a minister and congregation assembled in church during divine worship, on the Sabbath-day. Conviction *sustained*, which followed on a verdict of the Jury finding the panel guilty of breach of the peace as libelled, but malice not proven.

THE complainer was charged at the instance of the respondents, procurators-fiscals at Hamilton, in a criminal libel, which set forth :—

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THAT ALBEIT, by the laws of this and of every other well-governed realm, Breach of the Peace, especially when committed wilfully and maliciously on the Sabbath-day in a church, in presence of the minister and congregation, and during divine worship, and more especially when committed by a person who has been previously convicted of that crime; as also, the wickedly, wilfully, and maliciously disturbing and annoying a minister and congregation, assembled in church during divine worship, on the Sabbath-day, are crimes of an heinous nature and severely punishable: YET TRUE IT IS AND OF VERITY, that the said Archibald Dougall has been guilty of the said crimes, aggravated as aforesaid, or of one or other of them, actor, or art and part: IN SO FAR AS, the Reverend William Carrick, now or lately residing at the manse of East Kilbride, in the parish of East Kilbride aforesaid, hav-

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No. 20. ing at the times after libelled, and previously, been the parish minister
 Dougall v. of East Kilbride aforesaid, and in the practice of officiating as such in
 Dykes. the Established Church of that parish; and the said Archibald Dougall
 High Court. having been, at the said dates, in the habit of going to or attending
 Nov. 18. the said church on the Sabbath-days; and he, the said Archibald
 1861. the said church on the Sabbath-days; and he, the said Archibald
 Suspension. Dougall, having conceived groundless malice and ill-will towards the
 said Rev. William Carrick, and having formed the design of disturbing
 and annoying the said William Carrick, when engaged in church
 in performance of his sacred duties, and of disturbing the congregation
 assembled to join in the worship, or some of them, he, the said
 Archibald Dougall, did wickedly, wilfully, and maliciously, on various
 Sabbath-days in the months of August, September, October, November,
 and December 1860, and in the months of January, February,
 and March 1861, go to the parish church of East Kilbride aforesaid,
 and did seat himself in or near the seat or pew therein usually
 occupied by him, in whole or in part, for the apparent or pretended
 purpose of being present at, and joining in, the sacred service; and
 the congregation of the said church being assembled, and the said
 Rev. William Carrick having ascended the pulpit and commenced the
 service, the said Archibald Dougall, in pursuance of his said wicked
 and malicious design, did rise from his said seat during the worship or
 service, and while the same was proceeding, and walk through the
 church to a door thereof distant from his seat, and thereby leave the
 church, all in a noisy and irreverent manner; and continued to do so
 systematically Sunday after Sunday when the said Reverend William
 Carrick officiated, and his malicious motives and predetermined conduct
 being well known and expected, the attention of the congregation
 was fixed upon him immediately on the said Rev. William Carrick
 entering the pulpit, until he had accomplished his said habitual outrage;
 and by all which, the minds of the said minister and congregation
 were discomposed, their devotions interrupted, and they were otherwise
 disturbed and annoyed, all in breach of the peace.

The libel then stated several dates, being Sundays, on which the suspender acted in the manner above described, 'by which the said Archibald Dougall, on each 'and all of the said dates above libelled, committed a 'breach of the peace.'

The suspender was brought before the Sheriff-substitute, an objection to the relevancy of the libel having been repelled, he was tried before a jury, who found the panel guilty of breach of the peace as libelled, but found malice not proven.

The Sheriff-substitute, in respect of the verdict, fined the panel £10,—

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And in default of payment thereof, decerns and adjudges the said Archibald Dougall, panel, to be imprisoned within the prison of Hamilton for the period of two calendar months from this date: Further, ordains the said panel to find caution to keep the peace for the period of twelve months under the penalty of £50; and in default of finding such caution, decerns and adjudges the said panel to be further imprisoned within the said prison for the period of two calendar months. But on payment of such fine, and finding such caution within six days, or on the expiration of said periods respectively, ordains him to be set at liberty, and decerns.

The suspender paid the fine and found caution. He brought the present suspension, and stated that his reasons for not attending the ministrations of the Rev. Mr Carrick were conscientious; that he was accustomed to attend the parish church, that he did not do so when he knew that Mr Carrick was to preach; that Mr Carrick was often absent; that if he happened to go when Mr Carrick officiated, he left the church, but he averred that he did not do so in such a manner as to disturb the congregation, or with any desire to do so.

He maintained—

1. That the libel did not relevantly charge a breach of the peace. It was averred that he left the church in a noisy and irreverent manner; these terms were too vague and indefinite. It was matter of opinion whether conduct was or was not irreverent. A charge of having behaved in the way libelled would certainly not have been a relevant charge of breach of the peace, had it occurred in a theatre, or any where but in a church; but, (1.) The place where a certain course of conduct had been pursued, could not affect the question of breach of the peace. (2.) The circumstance, that the acts with which the complainer was charged were done in a church, was in the libel set forth as an aggravation merely, and did not form part of the same main charge. It was of the essence of breach of the peace that the

No. 20. conduct charged caused alarm to the public, and tended
 Dougal v. to destroy the sense of public security—Hume, Criminal
 Dykes. Law, p. 439 ; *Williams v. Glenister*, May 8, 1824, 2
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Suspension. 2. Even if the charge were relevant, the verdict of the jury finding malice not proved amounted to an acquittal. Leaving church without any wrong motive was not a breach of the peace.

3. The conviction should be quashed, because it did not provide for the complainer's liberation on payment or finding caution, unless he paid and found caution within six days.

4. The proceedings had been irregular, in respect, (1.) The complainer's declaration, which was used in evidence, had been dictated by the fiscal. (2.) The previous conviction had been proved only by the evidence of the Rev. Mr. Carrick, which was insufficient and incompetent proof of a previous conviction.

The Court did not call for a reply.

LORD ARDMILLAN.—This is a clear case ; we cannot give effect to this suspension. I should be sorry could it be doubted that a person who does what this person is said to have done could not be reached by the law. The libel is perhaps somewhat long, but it contains a distinct statement of conduct which it is impossible to view as other than a breach of the peace ; and I cannot concur in the view that conduct which may not be a breach of the peace in one place, must therefore be permitted in every other place. We do not indeed attach any sanctity to the building in which public worship is carried on ; but we do hold that decency of conduct in a church is most important ; and I cannot hold conduct destructive of such decency and order as other than a breach of the peace. Malice, or a deliberate intention of wounding the feelings of the minister has indeed been negatived by the jury. But there remains, without malice, enough set forth in this libel to support the charge of a breach of the peace, namely, the charge of

disturbing that order which should prevail in a place of worship, and which the congregation are entitled to expect the law to maintain.

If any officer of the church should remove a man who was disturbing the order necessary in a place of worship, there can be no doubt that he would be supported by the law ; and if a man's conduct be such as would warrant his removal on account of it, that conduct is clearly a breach of the peace. We are not here reviewing the evidence ; there is enough here averred and found proved, to support the charge of commission of a breach of the peace ; I therefore see no reason for disturbing the conviction.

LORD NEAVES.—I am clearly of the same opinion. I throw out of view the element of malice ; and only inquire whether, without malice, this is a good charge of a breach of the peace. The libel might have been framed otherwise ; but it sets forth a series of acts by which, by a systematic course of conduct from time to time, the accused is said to have produced this effect, that the minds of the minister and congregation were discomposed, their devotions interrupted, and they were otherwise disturbed and annoyed, all in breach of the peace. Now, the jury have affirmed the proposition that the conduct has been in breach of the peace, and I find nothing in the libel to contradict that conclusion.

However conscientious the views of this gentleman may have been, however free from malice, the acts set forth are such as might very naturally admit of the construction, that they were intended as an insult to the minister ; and I cannot doubt that a series of such insults, repeated Sunday after Sunday, or time after time, may amount to a breach of the peace. The conduct described was not only an insult to the minister, but also to the congregation, and was calculated to give rise to great irritation, and to a determination to repress it. It could not have been allowed to go on day after day, and the result would have been that some member of

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No. 20. the congregation would have interfered to put a stop to
 Dougall v. it by force, and scenes of the most unseemly and violent
 Dykes. nature might have been the consequence. On the whole,
 High Court. I cannot see that the charge in the libel is improperly
 Nov. 18. laid, or not quite sufficient to support the verdict.
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The LORD JUSTICE-CLERK.—I am of the same opinion. The conduct charged against the suspender in the minor proposition, amounts to a gross insult to the minister while performing his duty in the church, and being so, to a gross insult to every individual member of the congregation who was attending on his ministry. I think that such conduct was directly calculated to produce a breach of the peace, and I would only add, if we were to hold that such conduct could not be repressed by the criminal law of the country, that would only tend the more to make such conduct lead to breaches of the peace.

The suspension was refused, with expenses.

ALEXANDER WYLIE, W.S.—ANDREW MURRAY JUN. W.S.—Agents.

THOMAS LAW and MARY TURNER, Suspenders—*F. W. Clark.*

AGAINST

THOMAS LINTON, Respondent—*G. Young—Millar.*

SUSPENSION—STATUTE 11TH AND 12TH VICT. C. cxiii. (Edinburgh Police Act)—BREACH OF THE PEACE.—Certain persons were charged, in the Police Court of Edinburgh, under the Edinburgh Police Act of 1848, with breach of the peace by disorderly conduct, and two of them with suffering disorderly conduct at the same time and place. The charge of breach of the peace having been found not proved, and the persons charged with suffering disorderly conduct having been convicted, a suspension, at their instance, on the ground that the riot not having been proved, they could not be legally convicted of suffering it, *refused*.

Refusal to separate the trials of several panels is not a relevant ground of suspension, unless it amounts to oppression.

THE complainers, and certain other parties, were charged with the commission of a breach of the peace, and the complainers with a contravention of sect. 159 of the Edinburgh Police Act (1848), in so far as, on 29th October 1861, the complainers, and the other parties, did all, or each, or one or more of them, in the house in South Bridge Street occupied by the complainers, behave in a disorderly manner; and in so far as, same date and place, the complainers did, in contravention of section 159 of the Edinburgh Police Act (1848), 'suffer riotous and disorderly conduct' within the premises occupied by them.

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The Judge of the Police Court found the complainers guilty of suffering the riot, and the complaint not proved against the other parties. The complainers being imprisoned, prayed for suspension and liberation, because, (1.) The charge of disorderly conduct not being proved, the charge of suffering it should have been held not proved also; (2.) Because the complainers moved for a separation of the trials of themselves and of the other parties charged with disorderly conduct, that they might adduce them as witnesses in reference to the charge of contravention of the Police Act, by suffering disorderly conduct.

LORD ARDMILLAN.—It was within the discretion of the magistrate to separate the trials, or to refuse to do so, and this Court has nothing to do with his exercise of that discretion. As to the other ground of suspension, though the charge of riot might not be proved against any one of the parties accused of it, there may still have been a riot in which some of the parties were engaged, and which the complainers may have permitted. If the Judge had sufficient evidence of that, and we are not here to judge of the sufficiency of the evidence, he was warranted in convicting the complainers.

LORD NEAVES.—I am of the same opinion. But while I hold that it is entirely within the discretion of a judge to separate trials, or to refuse to do so, yet I do not say

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that there may not be cases where the interests of justice so plainly require a separation of the trials of two or more panels that a refusal to separate the trials might be a good ground of suspension. No such case, however, is made here.

The LORD JUSTICE-CLERK.—It is quite possible that the riot which the complainers permitted in their house was the same riot as that with which the other parties were charged, and yet it might have been impossible for the Judge, on the evidence before him, to find that any one of the parties charged with it took part in it. Yet it may have been perfectly clear that there was such a riot, and that the complainers permitted it. On the other hand, it is quite possible that the riot mentioned in the second charge was not the same riot as in the first charge. No doubt it is said to have taken place on the same day, and in the same house, but, unfortunately, it is by no means impossible that there should be two or more riots in the same house, and on the same day. Then, as to the other point, I think the allegation that the Judge refused to separate the trials is not a relevant ground of suspension at all, unless the refusal comes up to a case of oppression. Anything short of that will not do, because there is nothing more within the discretion of a Judge than to say whether two or more panels should or should not be tried together.

The Court refused the bill, with expenses.

JAMES BELL, S.S.C.—JOHN RICHARDSON, W.S.—Agents.

ANNIE DONALDSON, Suspender—*Paterson*.

AGAINST

HENRY BUCHAN, Respondent—*A. R. Clark*.

LIBEL—RELEVANCY—PROCESS—RESET OF THEFT—SUSPENSION.—A complaint in a Police Court, libelling that an accused had received goods knowing them to have been stolen, *held* (in a suspension) irrelevant, because it contained no substantive averment that the goods had been stolen.

THE suspender having been convicted of reset of theft by the Judge of the Police Court at Stirling, presented this note of suspension ; the grounds of which were, that she (a servant girl, seventeen years of age,) had been apprehended on 15th July last, conveyed to Stirling, and detained in the police cells all night, without complaint or warrant, and next morning that she had been charged on a complaint at the bar of the Police Court with reset, without having had any opportunity of taking advice, and of communicating with her friends. Besides, the complaint contained no relevant charge of reset, in respect that it did not state that the property alleged to have been resetted had been actually stolen, nor from whom nor by whom it had been stolen, nor the time, place, or mode at or in which the theft had been committed.¹

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¹ The objections pleaded were, 1. That the apprehension of the suspender on the 15th July was without warrant.

2. That undue means were used to induce her to plead guilty.

3. That the charge was irrelevant, in respect that the goods are not substantially alleged to have been stolen.

4. That the warrant for apprehension was not written out or signed until after conviction.

5. That the sentence was written out and signed after the suspender was removed from Court.

In support of the 1st and 4th of these objections, the suspender referred to the cases of *Crawford v. Wilson and Jamesons*, High

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The complaint, which was dated 16th July 1861, was as follows:—

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Annie Donaldson, lately residing in Alva, and county of Stirling, has been guilty of the crime of reset of theft, actor or art and part, in so far as, upon the 21st day of June 1861, or upon one or other of the days of that month, within the dwelling-house or premises possessed by John Stupart, maltster, situated in King Street of Stirling, she did wilfully and feloniously reset and receive certain articles enumerated in the libel, 'the property of or in the lawful possession of the said John Stupart, residing in King Street aforesaid, she, the said Annie Donaldson, did reset and receive the said articles, well knowing the same to have been stolen, and the value of said articles is less than £10 sterling.'

The respondent contended that, while the objection to the relevancy would have been good, if taken to an indictment before the Justiciary Court, it was not good when taken to a complaint to the Police Court. The minute criticism applied to indictments was not applicable to such complaints; all that was essential in such complaints was, that they should duly inform the panel of the offence charged, and the facts on which the charge was based.

The LORD JUSTICE-CLERK.—That is true when the offence charged is properly a police offence, but not when it is a crime cognisable by other courts, but to which Police Courts are made competent.

CLARK, for the respondent—By the General Police Act, 13th and 14th Vict. c. 33, under which the conviction was pronounced, convictions under the Act could be reviewed only on the grounds of corruption, malice, and

Court, Nov. 19, 1838, Swinton, vol. ii. p. 200; *Law v. Steel*, High Court, July 21, 1846, Arkley, p. 109; *Robertson v. Mackay*, High Court, July 21, 1846, Arkley, p. 114; *Ritchie v. Pilmer*, High Court, Dec. 20, 1848, J. Shaw, p. 142; *Blyths v. M'Bain*, High Court, Feb. 20, 1852, J. Shaw, p. 554.

As regarded the alleged oppressive nature of the whole proceeding, reference was made to *Crawford v. Blair*, High Court, Nov. 17, 1856, Irvine, vol. ii. p. 511; *Graham v. Linton*, High Court, Nov. 24, 1856, Irvine, vol. ii. p. 598.

oppression of the Judge, wilful deviations from the statutory form, and want of power, including want of jurisdiction. Here the objection was only to form; it could not be said that the crime of reset of theft was not charged, but only that there was a want of sufficient specification.

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LORD ARDMILLAN.—I think this objection, which amounts to a plea of defect of jurisdiction, should be sustained, because, if the complaint does not contain a clear and full statement of the crime meant to be charged, there is no jurisdiction to try the case. We do not deal with complaints in Police Courts with the same strictness as with indictments, but in no Court could the prosecutor charge that as a crime, the description of which does not contain the crime. In a charge of reset, three facts must be fairly and clearly stated—1. That the goods were stolen. 2. That the accused party received them. 3. That she received them knowing them to be stolen. These three facts must be all averred in the charge. Here there was no statement of the time or place of the theft, or of the name of the thief, or that these things were unknown to the prosecutor; there was not even a substantive statement that the articles were stolen. That is left to be inferred from the statement that the accused knew they were stolen, but I do not think it is sufficient that this material and essential element of the crime may be arrived at by inference; the prosecutor was bound to state that there had been a theft of the articles. I am disposed to think that this objection acquires additional force from the circumstances of a case, in which the procedure, as appears on the face of the proceedings, should have been so summary.

LORD NEAVES.—I am of the same opinion. I think that it would be a serious matter if this were held a good charge of reset. It is at the foundation of that charge that a theft was committed, and it is essential to justice that substantive notice of that fact should be given to the party accused. This complaint is not

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founded on an averment of theft, and it would be very unsafe to leave that to the kind of inference arising from the use in the complaint of the words 'knowing the same to have been stolen.' That is said to imply not merely that the party believed that the articles were stolen, but also that they were stolen as matter of fact. The tendency of such a mode of libelling, if recognised, would be to leave the accused party unprepared for the substantive part of the charge, and to mislead the magistrate as to the matter of fact necessary to be proved.

A party may have all the moral guilt of reset without having committed the crime. He may think that the goods were stolen ; but unless they were actually so, he has not committed the crime. The crime of reset of theft consists not only in the conduct of the accused, nor in the state of his mind, which is all that is here stated, but also in the circumstance that a previous crime has been committed by another person, and that should have been set forth.

When the thing charged does not come up to a crime, there is no jurisdiction in the Judge, and his sentence is as void as if it had been for any innocent act.

The LORD JUSTICE-CLERK.—I am of the same opinion ; and I think if we were to disregard this objection, and sustain this conviction in the face of it, our judgment would be fraught with the most dangerous consequences. This is a conviction of the crime of reset of theft, or it is nothing at all. There can be no conviction good in law of any crime which does not proceed on a libel or complaint which relevantly sets forth *species facti* amounting to that crime ; and a conviction proceeding on a libel or complaint not setting forth *species facti* amounting to that crime, is a conviction in excess of the jurisdiction of the judge, for no judge has jurisdiction to convict of a crime which is not charged. To reset of theft three things are indispensable. In the first place, that the property resetted shall have been stolen ; secondly, that it shall have been received by the accused ; and, thirdly,

that the accused when receiving it shall be in the guilty knowledge that the property has been stolen ; and the want of any one of these is fatal to the relevancy of a charge of reset of theft. In dealing with the statement in a complaint of this kind of the facts necessary for a relevant charge of the offence, I cannot leave out of view any one of these elements. It is said that we should apply our minds to the consideration of such a complaint in a more indulgent spirit than if we were criticising an indictment, and that an objection which the Court might sustain, if made against an indictment, ought not to be fatal to a complaint in the Police Court, and to the proceedings following on it. I think that doctrine, as stated, is in the highest degree dangerous. In the trial of proper police cases, as when a party is brought up as drunk and disorderly, even if a written complaint is necessary, it may not be necessary that that complaint should assume the form of a regular indictment, or should contain a major and minor proposition. In such a case, it is quite sufficient, if there be a proper allegation, that at a certain time, and in a certain place, the party committed a contravention of the Act of Parliament, or if facts are set forth involving such a contravention. We have had examples of such cases in *Jackson v. Linton*, High Court, February 27, 1860, Irvine, vol. iii. p. 563, in which the panel was charged with an attempt to pick pockets, and *Parrot v. Lang*, High Court, March 5, 1860, Irvine, vol. iii. p. 572, where the charge was of suffering disorderly conduct, which are proper statutory police offences. But where the Defender is accused of a crime, as reset of theft, I think it makes very little difference to what tribunal the prosecutor resorts, as regards his obligation to state the offence relevantly ; it is just as incumbent on the prosecutor in a Police Court to state a charge of reset of theft, or the like, in a complaint relevantly, as it is for the Lord Advocate, in this Court, to state such a charge relevantly in an indictment ; and any defect

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that goes to absolute irrelevancy is just as fatal to a charge in a Police Court, as to the relevancy of an indictment in the High Court of Justiciary. Now, what is the case here? We are here presented with a statement of facts, in which it is said that the accused did reset and receive certain articles, 'the property of or in the lawful possession of the said John Stupart;' and then these words are added, 'she, the said Annie Donaldson, did reset and receive the said articles, well knowing the same to have been stolen.' That is the whole statement. It is not alleged that the articles were stolen, by whom the theft was committed, nor when nor where the theft was committed, nor from whom the articles in question were stolen. Some of these matters are left to inference, and some of them cannot be inferred at all from this complaint. It cannot be known from this complaint who stole the articles, or when or where they were stolen. Yet the accused, under such a libel, is entitled to know what these facts are, or that the prosecutor, for some sufficient reason, was unable to ascertain them, but is prepared to prove that theft was undoubtedly committed of the goods said to have been resetted. I think, that the circumstance that this was a case to be tried before a Police Magistrate, makes it all the more necessary to the due administration of justice, that the facts constituting the offence charged should be distinctly stated; because the magistrate, not being an educated professional lawyer, may more readily fall into the error of thinking, that it is sufficient for conviction, if it be proved, in the first place, that the accused person received the goods; and, in the second place, that he betrayed such symptoms of guilty knowledge as led with moral certainty to the conviction that he knew that the things had been stolen. But if he convicted the accused on such evidence, there certainly could be no greater error,—and yet there could be no redress, because

the objection would arise on the evidence, which we cannot review. The circumstance that we cannot review the merits of a judgment on the evidence, makes it all the more necessary, that all the procedure, preceding the taking of the evidence by the Judge of the Inferior Court, should be perfectly regular. I am quite satisfied that this is not a charge of reset of theft, because it is defective in the statement of that which is essential to the offence, and, therefore, that the magistrate, in convicting on this charge, exceeded his jurisdiction.

The Court sustained the reasons of suspension, and found the complainer entitled to expenses.

J. & A. PIDDIE, W.S.—Agents.

SUSAN NICOLSON OR DONALDSON, Suspender—*F. W. Clark.*

AGAINST

THOMAS LINTON, Respondent—*G. Young.*

SUSPENSION—PROCESS—POLICE COURT—CONVICTION.—A Police Judge convicted person of an offence against the Act for regulation of public-houses, on the ground that the offence was proved by A, and two other persons, 'credible witnesses.' He also sentenced A to imprisonment for prevarication during the trial. Suspension by A, on the ground that she could not be guilty of prevarication if she were a credible witness—*repelled.*

Question, Whether the Procurator-Fiscal in the Police Court, who was also complainer in the trial for contravention of the Public Houses Act, was the proper respondent in such a suspension? or, Whether the Judge should have been called as respondent?

IN a trial, in the Police Court of Edinburgh, for contravention of the 15th section of the Regulation of Public Houses Act, 16th and 17th Vict. c. 67, on a complaint at the instance of Mr Linton, the superintendent of police, the suspender was called as a witness for the prosecutor, and a conviction was pronounced against the persons charged. The conviction bore that it proceeded

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on the evidence of the complainer, and of two other persons, 'credible witnesses.'

After the conviction was pronounced, the police judge, in virtue of the power conferred by the 97th section of the Edinburgh Police Act, 11th and 12th Vict. c. 113, which provides—

' that if any person, when under an examination on oath or solemn affirmation before the judge, shall prevaricate, or wilfully conceal the truth, it shall be lawful to the judge, in open Court, and in a summary manner, to adjudge the person so offending to imprisonment for any term not exceeding sixty days; and the sentence awarding such imprisonment shall set forth the nature of such offence,'

pronounced the following sentence against the suspender :—

' Whereas Susan Nicholson or Donaldson, residing at Greenside Row, Edinburgh, having been this day examined before me, Robert Johnston, judge of the Police Court of Edinburgh, as a witness upon oath, in a complaint at the instance of Thomas Linton, superintendent of police, Edinburgh, against John Mooney and Mary Ann Hepburn or Greig, both residing at Low Calton, Edinburgh, did, in giving her evidence, wilfully conceal the truth, in respect that, in the course of said evidence, she, after due warning, repeatedly evaded and refused to answer the questions put to her; therefore, in open Court and in a summary manner, I convict the said Susan Nicholson or Donaldson of wilful concealment of the truth, and adjudge her to be committed to the prison of Edinburgh for thirty days from this date, at hard labour; and warrant is hereby granted to officers of Court to incarcerate her in said prison, therein to be detained accordingly.'

The suspender brought the sentence under review by suspension—arguing, that as the conviction in the principal trial was contradictory of the conviction for prevarication, the latter must be held as erroneous.

For the Respondent.—Under the Act 16th and 17th Vict. c. 67, and the Act 9th Geo. IV., c. 58, to which the former Act referred, he acted, in prosecuting these complaints, merely in a private capacity. The sentence was an independent act of the judge, with which he had nothing to do. He was not the proper respondent. If the judge had gone wrong, he should have been the re-

spondent himself. If, however, the Court thought he (Mr Linton) might be respondent, he did not desire to object.

For the Suspender.—If that were so, there was nothing to hinder the Court proceeding without a respondent.

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Suspension.

The LORD JUSTICE-CLERK.—I am not willing to rest my opinion on a solution of the question, whether, in a suspension of this kind, Mr Linton, being an officer of the Court, may not be made a respondent. That may require consideration.

But it is idle to enter on a consideration of the question, because I believe we are all of opinion, that the objection is, on the merits, utterly irrelevant. The Act of Parliament authorizes the judge, if he finds that a witness ‘shall prevaricate or wilfully conceal the truth, ‘in open Court and in a summary manner, to adjudge ‘the person so offending to imprisonment for any term ‘not exceeding sixty days,’—a very useful power in trying cases occurring in these Courts.

The warrant of commitment in this case sets out that the suspender, being examined as a witness, ‘upon oath, ‘in a complaint at the instance of Thomas Linton, ‘superintendent of police, Edinburgh, against John ‘Mooney and Mary Ann Hepburn or Greig, both residing at Low Calton, Edinburgh, did, in giving her ‘evidence, wilfully conceal the truth, in respect that, in ‘the course of said evidence, she, after due warning, repeatedly evaded and refused to answer the questions ‘put to her,’ and therefore the judge proceeded to sentence the suspender to a certain number of days’ imprisonment, and nothing is said against the regularity of this warrant. The sentence is not challenged on any ground affecting the warrant of commitment. But it is said that a statement has been made by the judge inconsistent with the fact found by this incidental warrant of commitment, that the suspender, as a witness, wilfully concealed the truth, and this is founded on a statement

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in the conviction, following on the trial in which the suspender was a witness, namely, that that conviction proceeded on the testimony of the complainer and other parties as credible witnesses. That is in accordance with the form given in the schedule of the Act 9th Geo. IV., and no more is meant by it than that the witnesses examined in support of the complaint are, in the estimation of the judge, credible to such an extent, and in such a sense, that it justifies him in pronouncing sentence. The statement that the conviction proceeded on the evidence of credible witnesses, is merely an affirmation as matter of fact, that the conviction proceeded on credible evidence. Between that affirmation, and the assertion that the witness adduced has wilfully concealed the truth, there is no inconsistency whatever, because the witness may, notwithstanding, have given her evidence in such a way as to convey to the judge a correct impression that, as to the matters of which she did speak, she was a credible witness.

I prefer, therefore, to put my judgment on the ground that the objection is untenable, and to waive consideration of the other question, whether Mr Linton is the proper respondent in this case.

LORD ARDMILLAN concurred.

LORD NEAVES concurred, and thought that Mr Linton might have opposed the bill as respondent if he thought proper, but that he was not bound to do so.

The Court repelled the reasons of suspension.

JAMES BELL, S.S.C.—JOHN RICHARDSON, W.S.—Agents.

Present,

Dec. 2.
1861.

THE LORD JUSTICE-CLERK,

LORDS IVORY AND COWAN.

HER MAJESTY'S ADVOCATE—*Lord Advocate Moncreiff*—*W. Ivory A.D.*

AGAINST

JAMES FAIRWEATHER—*A. R. Clark*—*Lancaster*.

- FORGERY—UTTERING—BILL OF EXCHANGE—*Locus*—PRODUCTIONS—INDICTMENT—RELEVANCY.—SENTENCE.—1. Objection to the statement of the *locus* in a charge of the Uttering of certain Forged Bills of Exchange, as being at or near the Post-Office at Dundee, 'or at ' or near some other Post-Office in or near Dundee, or in the shire ' of Forfar, or in Scotland, to the prosecutor unknown'—*repelled*.
 2. Objection to the admissibility of certain productions in the inventory, reserved until they were tendered in evidence.
 3. A panel who pleaded guilty of Uttering the Forged Bills of Exchange sentenced to eight years' penal servitude.

JAMES FAIRWEATHER was charged on Criminal Letters, that—

No. 24.
James
Fairweather.

WHEREAS it is humbly meant and complained to us by our right trusty James Moncreiff, Esquire, our Advocate for our interest, upon James Fairweather, now or lately prisoner in the prison of Glasgow: THAT ALBEIT, by the laws of this and of every other well governed realm, Forgery; as also the wickedly and feloniously Using and Uttering, as genuine, any Forged Bill of Exchange, Promissory-Note, or other Writing, having thereon any forged subscription, knowing the same to be forged, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that the said James Fairweather is guilty of the said crimes, or of one or other of them, actor, or art and part: IN SO FAR AS (1.) on the 27th day of December 1860, or on one or other of the days of that month, or of November immediately preceding, or of January immediately following, in or near the office or business premises in or near Meadowside, Dundee, then occupied by the said James Fairweather, or at some other time or place in or near Dundee or in the shire of Forfar or in Scotland to the prosecutor unknown, the said James Fairweather did, wickedly and felo-

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&c.

No. 24. niously, forge and adhibit, or cause or procure to be forged and adhi-
James bited, upon a bill of exchange or other writing, in the following or
Fairwea- similar terms :—
ther.

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‘ James Fairweather
‘ £400 Stg Dundee 27th December 1860.
‘ Four months after date pay to my order in London the sum of
‘ Four hundred pounds stg value received
‘ To Messrs Schimmel & Co
‘ Amsterdam,’

Forgery,
&c.

the subscription ‘ Schimmel & Co,’ or a similar subscription, as the subscription of the acceptors of said bill of exchange or other writing, intending the same to pass for and be received as the genuine subscription of a firm of the name of Schimmel and Company to the prosecutor unknown, or the same being a wholly false and fictitious subscription : FURTHER, the said James Fairweather having adhibited his own subscription upon said bill of exchange or other writing as drawer thereof, and having also adhibited his own subscription upon the back of said bill of exchange or other writing as indorser thereof, did, on the 3d day of January 1861, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at or near the principal post-office in or near High Street of Dundee, or at or near some other post-office in or near Dundee or in the shire of Forfar or in Scotland to the prosecutor unknown, wickedly and feloniously, use and utter, as genuine, the said forged bill of exchange or other writing, having thereon the said forged subscription, knowing the same to be forged, by then and there posting the said forged bill of exchange or other writing, or causing or procuring the same to be then and there posted, enclosed in an envelope or cover addressed to George Anderson, now or lately residing in or near Charles Street, Saint Rollox, in or near Glasgow, and then and now or lately manager to the firm of Alexander Fletcher and Company, then and now or lately carrying on business as flax-spinners in or near Garngad Road, in or near Saint Rollox aforesaid, or addressed to the said firm of Alexander Fletcher and Company, for the purpose of the said forged bill of exchange or other writing being transmitted by post, and delivered to or received by the said George Anderson, or the said firm of Alexander Fletcher and Company, in order that the said George Anderson, or the said firm of Alexander Fletcher and Company, might place the same to the credit of the said James Fairweather in his account with the said firm of Alexander Fletcher and Company, or discount the same, or cause or procure the same to be discounted; and the said forged bill of exchange or other writing, having thereon the said forged subscription, was transmitted by post, enclosed in said envelope or cover, and was in course of post, or shortly thereafter, delivered to or received by the said George Anderson, or some other

person acting for behoof of the said firm of Alexander Fletcher and Company to the prosecutor unknown, in or near the office or business premises in or near Garngad Road aforesaid, then occupied by the said firm of Alexander Fletcher and Company, or elsewhere in or near Glasgow to the prosecutor unknown, and the same was afterwards placed to the credit of the said James Fairweather in his account with the said firm of Alexander Fletcher and Company, or was discounted, or caused or procured to be discounted, by the said George Anderson, or by the said firm of Alexander Fletcher and Company : LIKEAS (2.), on the 1st day of January 1861, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, in or near the said office or business premises situated in or near Meadowside, Dundee, then occupied by the said James Fairweather, or at some other time or place in or near Dundee, or in the shire of Forfar or in Scotland to the prosecutor unknown, the said James Fairweather did, wickedly and feloniously, forge and adhibit, or cause or procure to be forged and adhibited, upon a bill of exchange or other writing in the following or similar terms :—

‘ £750 . 0 . 0 Stg.

‘ Dundee 1st January 1861

‘ Four Months after date pay to my order in London the Sum of
‘ Seven hundred & fifty pounds Sterling value received

‘ To Mr Hermann Scheler

‘ Barcelona.’

the subscription ‘ Hermann Scheler,’ or a similar subscription, as the subscription of the acceptor of said bill of exchange or other writing last above libelled, intending the same to pass for and be received as the genuine subscription of Hermann Scheler, then and now or lately carrying on business as agent or merchant in or near Barcelona, or as the genuine subscription of some other person to the prosecutor unknown, or the same being a wholly false and fictitious subscription : FURTHER, the said James Fairweather having adhibited his own subscription upon said bill of exchange or other writing last above libelled as drawer thereof, and having also adhibited his own subscription on the back of the same as indorser thereof, did, on the 26th day of January 1861, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, at or near the said principal post-office in or near High Street of Dundee, or at or near some other post-office in or near Dundee or in the shire of Forfar or in Scotland to the prosecutor unknown, wickedly and feloniously, use and utter, as genuine, the said forged bill of exchange or other writing last above libelled, having thereon the said forged subscription, knowing the same to be forged, by then and there posting the said forged bill of exchange or other writing last above libelled, or causing or procuring the same to be then and there posted, enclosed in an envelope or cover, addressed to the said firm of Alex-

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&c.

ander Fletcher and Company, or to the said George Anderson, for the purpose of the said forged bill of exchange or other writing last above libelled being transmitted by post, and delivered to or received by the said George Anderson, or the said firm of Alexander Fletcher and Company, in order that the said George Anderson, or the said firm of Alexander Fletcher and Company, might place the same to the credit of the said James Fairweather in his account with the said firm of Alexander Fletcher and Company, or discount the same, or cause or procure the same to be discounted; and the said forged bill of exchange or other writing last above libelled, having thereon the said forged subscription, was transmitted by post, enclosed in said envelope or cover, and was in course of post, or shortly thereafter, delivered to or received by the said George Anderson, or some other person acting for behoof of the said firm of Alexander Fletcher and Company, to the prosecutor unknown, in or near the said office or business premises in or near Garngad Road aforesaid, then occupied by the said firm, or elsewhere in or near Glasgow to the prosecutor unknown, and the same was afterwards placed to the credit of the said James Fairweather in his account with the said firm of Alexander Fletcher and Company, or was discounted, or caused or procured to be discounted, by the said George Anderson, or by the said firm of Alexander Fletcher and Company.

The indictment set forth two other similar charges. 'The counsel for the panel objected to the libel, that too great latitude was taken in regard to the *locus*, in libelling that the bills had been posted at or near the principal office in or near High Street of Dundee, or some other post-office in or near Dundee, or in the *Shire of Forfar or in Scotland*.' They contended that were such latitude admitted, the panels could not avail themselves of the defence of *alibi*, which they might otherwise have been able to prove. Besides, putting the letter in the Post-Office was the completed act of uttering, its subsequent history, and its reaching Glasgow, was no proper part of the act of uttering.

Counsel for the prosecution contended, that in the circumstances stated in the libel, the latitude was allowable, the offence was, in fact, a list of continuous crime, begun at the place where the bill was posted, and continued to Glasgow, where it was to be received.

The LORD JUSTICE-CLERK said,—I had a little diffi-

culty about this objection at first ; but that difficulty is entirely removed on considering the manner of libelling the *locus* here. I understand that the prosecutor undertakes to prove that the bills were posted at Dundee ; but if he cannot do that, then he cannot prove another *locus* in Forfarshire, and must rely on the transmission of the letter to Glasgow by the panel. He could not be allowed to prove a direct act of posting in some other Post-Office in Scotland.

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LORD IVORY, while he felt the objection to be one of some delicacy, and not unattended with difficulty, was of opinion that it was not well founded.

LORD COWAN also concurred in repelling the objection.

LANCASTER, for the panel, then objected to certain documents in the inventory (numbers 85 to 119), on these grounds. The panel was first committed on the 1st June on the first bill of exchange only. He was again committed on the other three on the 18th July. On the 8th August, the Procurator-Fiscal, with a criminal-officer (Murray) came into the cell, and, without warrant, searched the prisoner, and took from his person in the cell, these documents.

The objection was reserved till the documents should be tendered in evidence.

The libel having been proved relevant, the panel pleaded guilty of the first two charges of uttering, as libelled.

Sentence, eight years' penal servitude.

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Present,

THE LORD JUSTICE-CLERK,

LORDS ARDMILLAN AND NEAVES.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland—Maitland-
Heriot A.D.*

AGAINST

JAMES REID—*Fraser—W. A. Brown.*

GEORGE DAVIDSON—*Mair.*

AND

GEORGE M'NEILL—*Fraser—W. A. Brown.*

RAPE—ASSAULT WITH INTENT TO RAVISH—SPECIAL DEFENCE—
CHARACTER—NOTICE TO PROSECUTOR.—In a charge of rape, al-
though the unchaste character of the woman said to have been
ravished is not matter of defence, due notice must be given to the
prosecutor if the panel intends to lead evidence of the woman's un-
chastity. 2. It is incompetent to lead evidence in respect to charac-
ter, other than at or about the time of the alleged offence. 3. It is
incompetent to lead evidence in proof of character on points colla-
teral to the issue, and not forming part of the *res gestæ*.

No. 25. JAMES REID, GEORGE DAVIDSON, and GEORGE M'NEILL,
James Reid & Others. were charged with Rape, or Assault with Intent to Ra-
High Court. vish, committed on the person of Agnes Edington or
Dec. 9. Arrowsmith, now or lately residing in or near Preston-
1861. pans, in the county of Haddington, wife of Henry Ar-
Rape, &c. rowsmith, lately Major in the 38th or other Regiment of
Foot, now residing in the Mauritius, or elsewhere abroad.

The panels pleaded Not Guilty, and they lodged
special defences, in which, besides a plea of *alibi*, ' they
' farther state, that Mrs Agnes Edington or Arrowsmith
' is a person of unchaste character, and has had carnal
' connexion with men other than the person said in the
' indictment to be her husband.'

The Court directed the allegation of unchastity to be deleted as a special defence, and to be stated merely as a notice of the panels' intention to lead evidence of the unchastity of the woman said to have been ravished.

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& Others.

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The statement was therefore amended as follows:— Rape, &c.

' They farther *give notice*, that *they allege and intend to prove that* Mrs Agnes Edington or Arrowsmith is a person of unchaste character,' &c.

In cross-examination, the principal witness deponed—

I was married in London; I was then staying with friends named Cotterel. I had been living three years with them. Q. What was their business? A. He was studying for the bar. I was not a servant in the house. Q. Did your husband first see you at a gay house? A. I don't know what you mean. One of my sons is in an office in Sydney, the other is doing nothing. They never were common soldiers. I have lived in Waterloo Place, Edinburgh. I don't know Mary Spence, and never heard of her. I don't remember of having a servant of that name. I have not within eighteen months gone to Mary Spence and asked her to come back to my service. [Shown No. 18 of the panels' list of witnesses]. I never saw that woman before. No men have slept with me when I was in Edinburgh.

For the defence, Mary Spence was adduced as a witness, and—

' The counsel for the panels having been requested to state the nature of the facts he proposed to prove by this witness, answered, that his object in her examination was twofold, 1st, to contradict the evidence of the principal witness, in respect to certain circumstances alleged to have taken place in her presence in the house of one Kerr at Haddington, between three and four years ago, but having no relation to the present case. 2d, To establish the unchaste character and conduct of the said witness at a past period, the exact date of which he could not precisely state, but occurring certainly a number of years ago.' Reference was made to Dickson on Evidence, and the authorities there cited, and counsel argued, that he would be entitled, taking into account the admissions

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unfavourable to her character, which the principal witness had made on cross-examination, to put it to the Jury that the bad character which had been established a number of years back was, by implication, to be held to apply to the date of the alleged offence, and he was therefore entitled to lead the evidence he proposed. He referred to Hume, vol. i. p. 304 ; *Alexander Stephens*, Aberdeen, April 20. 1839, Swinton, vol. ii. p. 348 ; *David Allan*, Glasgow, Dec. 27. 1842, Broun, vol. i. p. 500 ; *Walter Blair*, Glasgow, May 4. 1844, Broun, vol. ii. p. 167 ; *Francis Dignan*, High Court, Jan. 23. 1854, Irvine, vol. i. p. 357.

In regard to the second point, counsel argued, that everything that was material to the interests of the panels was pertinent to the issue, and if, by obtaining contradictions on collateral points, he could succeed in impeaching the credibility of the witness, such evidence as favourable to the panels was competent to him. He was therefore entitled to examine this witness to contradict the special statements made by the principal witness in regard to her, 15th and 16th Vict. c. 27, sect. 3.

The SOLICITOR-GENERAL, for the prosecution, answered—That no evidence was competent on any point that did not form part of the *res gestæ*, and that no notice was given in the special defence lodged for the panels, of the date at which the alleged bad character of the principal witness was proposed to be established, such evidence was incompetent as to any time, except the period when the offence was said to have been committed.

LORD ARDMILLAN.—Two questions have been raised in this case—both of some degree of importance. I am of opinion, that the proposal now made to lead evidence in regard to the previous character and conduct of this woman is of a very unusual description, and one which would require to be most strictly looked to on the part of the Court. The time to which the proposed evi-

dence relates is very remote, and the counsel for the panels is not prepared to state that he can connect that remote period with the more recent history of the woman, by other evidence bringing it down to the present time. It would, in my opinion, be most unfair to the woman, to admit evidence of what is said to have taken place, it may be twelve, fifteen, or eighteen years ago; at all events, without much more distinct and specific notice than has been given in this case.

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1861.
Rape, &c.

I do not think that what is here proposed is at all within the recognised rule as applicable to charges of rape. That rule, as I understand it, applies to proof of unchastity at and immediately before the time when the rape is said to have been committed. The prisoners' counsel may, if he thinks fit, carry that evidence of repute as far back as he pleases, in order to confirm it, but to begin the proof at a period many years back—more especially as no precedent or authority has been shown to us for such a course—appears to me to be a proceeding which cannot be sanctioned by the Court. Farther, as I understand from the prisoners' counsel, what he proposes to adduce is not a proof of prostitution, or even of reputed and notorious unchastity, but proof of particular acts of unchastity, or particular unchaste connection or relation as 'kept mistress' of a particular man, while, in regard to the man, or the relation, no name, or date, or place, is specified in the defences. To allow this proof, without the most specific and distinct notice as to name, place, and date, would, in my opinion, be unjust to the witness, whom the Court is bound to protect against an attack without notice.

As to the other question, I need only say that, taking into consideration both the words of the recent Act of Parliament, and our previous rules of evidence, I am of opinion, that the proof proposed to be led of collateral circumstances, occurring also a long time ago, is quite

No. 25. inadmissible as having no immediate bearing—no pertinency or relevancy to the question at issue.
James Reid & Others.

High Court. LORD NEAVES.—I am of the same opinion. I think,
Dec. 9. in the first place, that it is clearly competent to impeach
1861.

Rape, &c. the character of the principal witness in a case of rape, to allege and to prove her bad character, but then that must be her bad character at the time when the injury results. If it is alleged that this character was acquired at an earlier period, still it is necessary that it be established by something like continuous evidence up to the time of the alleged offence. This is of great importance to the witness, because it may be easy for her to contradict proof of bad conduct at a particular time and place. She may prove, for example, that she was not there, but in another part of the country, at the time. But the proof here offered seems to me to be inadmissible. I think there is no real pertinency in it, and that it would be most dangerous. To attempt to lead evidence as to a course of conduct many years back—perhaps in another country, would be quite irrelevant—at least unless under very special circumstances, and with the most distinct and special notice as to the party, the place, and the time.

Now here it is attempted to prove not bad reputation, but latent acts of individual unchastity at a great distance of time. I can imagine nothing more unfair, nothing more dangerous. Here the enquiry is, whether these panels had forcible connexion with the witness. If in the trial of such a case, the woman may be made to answer twenty different questions, as to whether on twenty different occasions she had connexion with as many different men, we might sit to the end of our lives investigating such cases. I conceive that such a course would be contrary to the principles of justice, and of judicial enquiry. In the present case, no specific notice has been given of such an enquiry, but even if there had, I should regard such

an enquiry into the whole latent life of the witness as a cruel and grievous evil.

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As to the other point which has been raised, I think the question irrelevant, and the line of enquiry proposed clearly incompetent. I adhere generally to the views of Lord Moncreiff, expressed in one of the cases that have been quoted to us. The only instances I can imagine where such proof would be admissible, would be where the alleged occurrences were so closely connected with the crime charged, as to form, in fact, part of the *res gestæ*, as where, for example, as happened in one case, the woman alleged to have been ravished had connexion with another man on the night of the alleged occurrence.

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1861.
Rape, &c.

THE LORD JUSTICE-CLERK.—I am entirely of the same opinion ; and were it not that the questions are of considerable importance, I should have contented myself with expressing my concurrence in general terms. It seems to me, that under the first branch, we have to consider two questions. Is the panel in such a case to be allowed without notice, or even with notice, to prove specific acts of unchastity, and are we to admit evidence of general bad repute without any limit as to time ? I have always entertained a strong opinion, in conformity with that of Lord Moncreiff. It is for the panels to show that at the time when the offence is said to have been committed, the woman was of loose and immoral character, not as matter of defence, but as bearing very materially on the effect of the evidence on the minds of the jury. The law has done wisely in making an exception in the case of rape from the general rule, that you cannot raise up a collateral issue, and allow a proof of a witness' character and repute. But to extend this to particular instances of unchaste conduct would be most unfair to the witness, especially without very pointed and distinct notice, and even with such notice.

But, 2d, What is here sought to be proved, is general

No. 25.
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Rape, &c.

evidence of reputation or character, not more recent than many years ago, which is all we could gather from the statement of the prisoners' counsel. The Court are not in possession of any more specific information as to date. Now, I object to this line of examination, very much on the same grounds as I object to proof of individual acts, because if a woman is in possession of a fair and honourable reputation at the time of the alleged offence, it would be in the highest degree unjust and inexpedient to enquire into her character at some former time. She may have been indiscreet, or even unchaste, in her conduct at some period of her life ; but if she is not so *now*, I do not think the enquiry relevant. I hold it to be indispensable, that the character sought to be proved, should be the character existing at the time when the rape is said to have been committed.

Another point has been raised, not indeed of the same importance, and as to it, I have no difficulty. The proof attempted of particular circumstances and incidents in this woman's life, merely for the purpose of contradicting the statements made by her on cross-examination, seems to me to have no pertinency or relevancy at all. I hold it to be established law, that such proof is inadmissible, and the laws of all countries agree in disallowing it.

The proposed evidence was therefore disallowed.

The Jury, by a majority, found the panels guilty of rape as libelled.

The Court sentenced the panels to be each kept in penal servitude for twenty-one years.

Present,

THE LORD JUSTICE-CLERK,

LORDS IVORY AND COWAN.

Dec. 16.
1861.HER MAJESTY'S ADVOCATE—*Sol. Gen. Mailland—
Mailland-Heriot A.D.*

AGAINST

BERNARD MACNAMARA—*Mair.*

ASSAULT—PROOF—WITNESS, MEDICAL—MEDICAL REPORT—STATUTE
21ST AND 22D VICT. C. 90.—The provision in the Medical Practitioners' Act (21st and 22d Vict. c. 90), that no medical certificate required by any act shall be valid unless the person signing it be registered under the Act, does not apply to a medical report proposed to be read in and proved in a criminal trial in the Court of Justiciary.

THE panel was indicted for assault to the effusion of blood, the injury of the person, and danger of life.

The Crown adduced as a witness a gentleman who acted as house-surgeon in the Royal Infirmary, Edinburgh, to prove a medical report signed by him, in reference to the injuries on the person of the assaulted party.

No. 26.
Bernard
Macna-
mara.High Court.
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Assault.

MAIR, for the panel, objected, that the report was inadmissible, because the witness was not a licentiate of medicine or surgery, nor a graduate of any university, nor registered under the Medical Practitioners' Act, 21st and 22d Vict. c. 90. It was enacted by the 37th section of that Act, that 'from and after 1st January 1859, no 'certificate required by any Act now in force, or that 'may hereafter be passed, from any physician, surgeon, 'licentiate in medicine and surgery, or other medical 'practitioner, shall be valid, unless the person signing 'the same be registered under this Act.' The date when this provision was to come in force had been altered by subsequent Acts, but the provision was in force.

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mara.
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The Court was of opinion that the Act did not apply to reports proposed to be read as evidence in Court, but to cases where medical certificates were required. In a court of law a medical certificate was not indispensable. It was merely put into the hands of the medical witness to aid his memory, and, therefore, the report was competent, and might be used in the present case.

GLASGOW WINTER CIRCUIT.

*Judge—*LORD ARDMILLAN.

Dec. 31.
1861.

HER MAJESTY'S ADVOCATE—*W. Ivory A.D.*

AGAINST

REUBEN BROOKS—*Millar—John Burnet.*

AND

FREDERICK-WILLIAM THOMAS—*Maclean.*

FALSEHOOD AND FRAUD—FALSE WITNESS—FORGERY.—Objections to the relevancy of an indictment charging 'Falsehood and fraud; as ' also fabricating and using false writings; as also forgery; as also ' using and uttering a forged bill of exchange or other writing,'—repelled.

No. 27.
Reuben
Brooks &
Frederick
William
Thomas.
Glasgow.
Dec. 31.
1861.
Falsehood
and Fraud,
&c.

REUBEN BROOKS and FREDERICK WILLIAM THOMAS were charged on criminal letters,—

THAT ALBEIT, by the laws of this and of every other well-governed realm, Falsehood and Fraud; As also the wickedly and feloniously Fabricating any False Writing to be used in a sequestration for the purpose of a pretended creditor attending, voting, or acting therein as a true creditor, and so using the same as true; As also the wickedly and feloniously Using and Uttering, as true, any False and Fabricated Writing, knowing the same to be false and fabricated, by producing the same in a sequestration for the purpose of a pretended creditor attending, voting, or acting as a true creditor therein; As also For-

gery; As also the wickedly and feloniously Using and Uttering, as genuine, any Forged Bill of Exchange or other Writing, having thereon any forged subscription, knowing the same to be forged, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that the said Reuben Brooks and Frederick William Thomas are, both and each or one or other of them, guilty of the said crimes, or of one or more of them, actors or actor, or art and part: IN SO FAR AS the said Reuben Brooks having, for some time previous to the month of June 1861, carried on business as a picture-dealer in or near Buchanan Street, in or near Glasgow; and the said Reuben Brooks having become indebted to Samuel Barton, merchant-tailor in or near Newcastle-upon-Tyne; Stephen Edward Trought, carver and gilder in or near Waterloo Street of Glasgow, and other creditors; and the affairs of the said Reuben Brooks having become embarrassed, and the estates of the said Reuben Brooks having been sequestered, and declared to belong to his creditors, for the purposes of the 'Bankruptcy (Scotland) Act 1856,' and of [page 2] the 'Bankruptcy and Real Securities (Scotland) Act, 1857,' and of the 'Bankruptcy (Scotland) Amendment Act, 1860,' by a deliverance of the Sheriff-substitute of Lanarkshire, dated on or about the 8th day of July 1861; or the said Reuben Brooks having it in contemplation to obtain sequestration of his estates under the said Acts; and the said Reuben Brooks and Frederick William Thomas having, both and each or one or other of them, devised a fraudulent plan to forge and fabricate, or cause or procure to be forged and fabricated, false and fraudulent bills of exchange, affidavits or oaths of verity, or other writings, and to produce the same, or cause or procure the same to be produced, by pretended creditors of the said Reuben Brooks in said sequestration, for the purpose of the said pretended creditors, by themselves or their mandatory or mandatories, or others authorised by them, attending, voting, and acting at meetings of the creditors in said sequestration, and influencing the election of a trustee and commissioners therein, and enabling the said Reuben Brooks to obtain personal protection from arrest and imprisonment, and otherwise defrauding the said Samuel Barton, Stephen Edward Trought, and other creditors of the said Reuben Brooks, or for one or more of said purposes, or for some similar fraudulent purpose: AND IN PARTICULAR (1.) the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, on an occasion or occasions between the 1st day of June and the 10th day of July 1861, the particular time being to the prosecutor unknown, or on one or other of the days of the said months, or of May immediately preceding, or of August immediately following, in or near the office or business premises situated in or near Saint Vincent Street, in or near Glasgow, then occupied by the said Frederick William Thomas, or at some other time or times, or at some

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No. 27. other place or places, in or near Glasgow or in the shire of Lanark to
 Reuben the prosecutor unknown, falsely, fraudulently, wilfully, wickedly and
 Brooks & feloniously, and in pursuance of the fraudulent plan above libelled,
 Frederick write, and fabricate, or cause or procure to be written and fabricated,
 William a bill of exchange or other writing in the following or similar terms:
 Thomas. [Then followed a specification of three bills for £300 each, dated
 Glasgow. London, Dec. 21, 1858, payable at nine months, twelve months, and
 Dec. 31. six months respectively]; [page 4] and the said Reuben Brooks did,
 1861. time or times and place or places last above libelled, falsely, fraudu-
 Falsehood and Fraud, &c. lently, wilfully, wickedly, and feloniously, and in pursuance of said
 fraudulent plan, subscribe his own name as acceptor upon all and each
 or one or more of the said three false and fabricated bills of exchange
 or other writings; and the said Reuben Brooks and Frederick William
 Thomas having, both and each or one or other of them, in pursuance
 of said fraudulent plan, caused or procured Frederick Hartmann,
 merchant, then and now or lately residing in or near Cannon Street,
 in or near London, to adhibit his signature on all and each or one or
 more of the said three false and fabricated bills of exchange or other
 writings, as drawer thereof, and to compare before Warren Stormes
 Hale, Esquire, one of our Justices of the Peace for the City of London,
 at London, on or about the 13th day of July 1861, and falsely and
 fraudulently to swear and depone, in presence of the said Warren
 Stormes Hale, that the said Reuben Brooks was, at the date of the
 said sequestration, justly indebted and resting-owing to him the said
 Frederick Hartmann in the sum of £900 sterling, contained in the
 said three false and fabricated bills of exchange or other writings
 above libelled, and to subscribe his name to a false and fabricated
 affidavit or oath of verity, dated at London the 13th day of July
 1861, in which the said false and fraudulent deposition was engrossed;
 and the said Reuben Brooks and Frederick William Thomas having,
 both and each or one or other of them, caused or procured the said
 Frederick Hartmann to subscribe a mandate, annexed to said false
 and fabricated affidavit or oath of verity or other document, authoris-
 ing the said Frederick William Thomas, therein designed Frederick
 Thomas, of the firm of M'Coton and Thomas, accountants, Glasgow,
 to attend, vote, and act for him, the said Frederick Hartmann, at all
 meetings of the creditors in said sequestration, and William Lyon
 M'Phun, accountant, now or lately residing in or near Great Kelvin
 Terrace, Great Western Road, in or near Glasgow, having inserted
 his own name as mandatory above the name of the said Frederick
 William Thomas, or Frederick Thomas, in said mandate, the said
 Reuben Brooks and Frederick William Thomas did, both and each or
 one or other of them, on the [page 5] 16th day of July 1861, or on
 one or other of the days of that month, or of June immediately pre-
 ceding, or of August immediately following, at a meeting of the

creditors in said sequestration, in or near the Crow Hotel, in or near George Square of Glasgow, falsely, fraudulently, wilfully, wickedly, and feloniously, and in pursuance of said fraudulent plan, use and utter, as true, all and each or one or more of the said three false and fabricated bills of exchange or other writings above libelled, and said relative false and fabricated affidavit or oath of verity, having the said pretended mandate annexed thereto, by giving in or producing the same, or causing or procuring the same to be given in or produced, in said sequestration, by the said William Lyon M'Phun, or by some other person to the prosecutor unknown; and all this the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, intending all and each or one or more of the said three false and fabricated bills of exchange or other writings above libelled to pass for and be received as true bills of exchange or other writings truly drawn, of the dates they respectively bear, by the said Frederick Hartmann upon the said Reuben Brooks, for the sums respectively therein mentioned, and truly accepted by the said Reuben Brooks, and intending the said affidavit to pass for and be received as a true affidavit, and for the purpose of the said Frederick Hartmann, by himself or his mandatory, attending, voting, and acting as a true creditor of the said Reuben Brooks for the sum of £900 or thereby, at a meeting or meetings of the creditors in said sequestration, and influencing the election of a trustee and commissioners, and enabling the said Reuben Brooks to obtain personal protection from arrest and imprisonment, and otherwise defrauding the said creditors of the said Reuben Brooks, or for one or other of said purposes, or for some similar fraudulent purpose, notwithstanding that the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, well know that the said Frederick Hartmann was not a creditor of the said Reuben Brooks, on any ground, or to any extent whatever, and that all and each or one or more of the said three bills of exchange or other writings, and said affidavits, were wholly false and fabricated; and the said William Lyon M'Phun did, in virtue of said pretended mandate, on or about the said 16th day of July 1861, attend a meeting of the creditors in said sequestration, held in the Crow [page 6] Hotel as aforesaid, and did then and there vote and act in said sequestration, in the election of a trustee and commissioners, and in granting the said Reuben Brooks personal protection from arrest and imprisonment, and otherwise on behalf of the said Frederick Hartmann, in respect of said false and pretended debt of £900; and personal protection from arrest and imprisonment was, in consequence, at said meeting held as aforesaid, granted to the said Reuben Brooks for the period of two years.

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The indictment then set forth two other charges.

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The fourth charge was thus stated :—

[Page 13] LIKEAS (4.) the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, on the 16th day of July 1861, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near the office or business premises situated in or near Saint Vincent Street, in or near Glasgow, then occupied by the said Frederick William Thomas, or at some other time or times, or at some other place or places, in or near Glasgow, or in the shire of Lanark, to the prosecutor unknown, falsely, fraudulently, wilfully, wickedly, and feloniously, and in pursuance of said fraudulent plan, enter or insert, or cause or procure to be entered or inserted, in a false and fraudulent state of affairs of the said Reuben Brooks, which the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, make or fabricate, or cause or procure to be made and fabricated, the said sum of £900 sterling as a debt due by the said Reuben Brooks to the said Frederick Hartmann, the said sum of £6000 sterling as a debt due by the said Reuben Brooks to the said firm of Solmson, Meyer, and Company, and the said sum of £4300 sterling as a debt due by the said Reuben Brooks to the [page 14] said Jehu Hunt, under the name of J. Hart, the said Reuben Brooks and Frederick William Thomas, both and each or one or other of them, well knowing that the said several sums were not due respectively to the said Frederick Hartmann, Solmson, Meyer, and Company, and the said Jehu Hunt, by the said Reuben Brooks; and the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, on the 16th day of July 1861, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, at a meeting of creditors in said sequestration in or near the Crow Hotel aforesaid, falsely, fraudulently, wilfully, wickedly, and feloniously, and in pursuance of said fraudulent plan, use and utter as true the said false and fabricated state of affairs, containing the said false and fabricated entries above libelled, by giving in or producing the same, or causing or procuring the same to be given in or produced, in said sequestration, by the said William Lyon M'Phun, or by some other person to the prosecutor unknown; and all this the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, in pursuance of said fraudulent plan, intending the said false and fabricated state of affairs to be received as the true state of affairs of the said Reuben Brooks at the said 16th day of July 1861, and for the purpose of the said Frederick Hartmann, Solmson, Meyer, and Company, and the said Jehu Hunt, or one or more of them, by themselves or their mandatories, attending, voting, and acting as true creditors of the said Reuben Brooks for the said sums respectively, at a meeting or meetings of creditors in said

sequestration, and influencing the election of a trustee and commissioners, and enabling the said Reuben Brooks to obtain personal protection from arrest or imprisonment, and otherwise defrauding the said creditors of the said Reuben Brooks, or for one or other of said purposes, or for some similar fraudulent purpose, notwithstanding that the said Reuben Brooks and Frederick William Thomas did, both and each or one or other of them, well know that the said Frederick Hartmann, Solmson, Meyer, and Company, and Jehu Hunt, were not creditors of the said Reuben Brooks on any ground or to any extent whatever, and that the said state of affairs, or at least the said entries therein, were wholly false and fabricated: And the said Reuben Brooks and Frederick William [page 15] Thomas are each of them respectively guilty, actor or art and part, of all and each or one or more of the several acts of falsehood and fraud, fabricating and using and uttering false writings, and forgery, and using and uttering forged bills of exchange above libelled, as committed by one or other of them respectively, by being cognizant of and aiding, abetting, and assisting in the same, in pursuance of the said fraudulent plan, or otherwise as above libelled.

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BURNET and MILLAR for the panel, objected to the relevancy of the libel—1. There was no minor proposition applicable to the major of *falsehood and fraud*, which must therefore be struck out as cumulative with the subsequent charges.

The objection was repelled.

2. The charge of *forgery* as regarded Brooks was not supported by a specific statement in the minor that he was guilty thereof, but only by the general clause towards the end of the indictment at foot of page 14 and top of page 15.

The objection was repelled in respect of the clause just referred to.

3. The general charge as stated in the minor proposition, beginning with the words 'In so far as,' on the first page of the indictment, and ending at the middle of page 2, was unintelligible, as it consisted of an unfinished sentence, entirely parenthetical.

LORD ARDMILLAN held that the objection would be removed by striking out the words 'And in particular,' which introduced the special charges, thus connecting the general with the special charges.

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On this being done, he repelled the objection.

4. The clause 'and otherwise defrauding the said Samuel Barton, Stephen Edward Trought, and other creditors of the said Reuben Brooks,' was too great a latitude for the prosecutor to take.

The Court ordered these words to be deleted.

5. There was no relevant charge of uttering. The charge made at pages 4 and 5 may be taken to represent all the minor propositions applicable to this charge, commencing with the words on page 4, 'and William Lyon M'Phun, accountant,' &c., down to page 5, 'or by some other person to the prosecutor unknown.' The objection to this charge was that, *first of all*, it was not said that William Lyon M'Phun was a pretended creditor, which was an essential element in the crime charged in the major; and *secondly*, that M'Phun was not said to have had any authority from either of the accused persons to insert his name as mandatory, which was necessary to incriminate the accused on this charge, as it was 'in virtue of said pretended mandate' that M'Phun was alleged to have attended, voted, and acted in the sequestration, by uttering the bills, &c.

The Court repelled this objection, on the ground that the correct reading of the libel was, that M'Phun having put his name on the mandate, thence followed the specific and relevant charge that the accused did utter the bills and affidavits, 'by giving in or producing the same, or causing or procuring the same to be produced in the sequestration, by M'Phun, or by some other person to the prosecutor unknown.'

6. The fourth charge in the libel of fabricating and uttering a false state of affairs could not be sustained, as it could not be pretended that a state of affairs enabled pretended creditors to vote and act in a sequestration, which was the essence of the crime charged in the major proposition.

The objection was repelled, and observed, that it might arise afterwards upon the evidence.

7. It was also objected generally to the use of the word 'produce' throughout the libel, that it was not sufficiently specific.

The Court repelled the objection, observing that 'produce' was a technical word, known to law; and, moreover, in this particular case it was explained sufficiently that the production was made at a meeting of creditors in the sequestration, and the way in which such production had to be made was provided for in the Bankrupt Acts. The Court intimated generally, in disposing of the above objections, that they might probably arise more properly on the evidence.

The case went to trial.

Several points arose for determination in the course of the proof.

W. L. M'PHUN stated that he had obtained authority from Thomas in prison to insert his name in the mandates, above that of Thomas.

It was objected that this was not the case put in the libel, and that the panels were taken by surprise, and were prejudiced by such evidence.

LORD ARDMILLAN held that it was due to the witness to allow him to explain on what authority he had inserted his name.

M'PHUN also deponed, that on the occasion of his meeting with Thomas in prison, he gave him a jotting on the back of an envelope of the state of affairs which was to be made up for Brooks, which he (M'Phun) gave to Millar, the agent in the sequestration.

WILLIAM RAMSAY thereafter spoke to his having written out the principal state of affairs from a copy, but could not say where he got that copy from.

On its being proposed to ask him as to the items of the copy and principal state, to connect them, it was objected that the loss of the copy had not been proved, and the question was accordingly disallowed, and witness was permitted only to be asked as to the respective

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amounts total of the copy and principal state of affairs, and not to compare the individual items.

The evidence having been concluded,

MILLAR and MACLEAN contended in behalf of the prisoners in point of law as follows, there being different considerations urged for each panel, and particularly for Brooks, that he was the dupe of Thomas :—

1. (Repeating the preliminary objection) it was argued—That no separate case of falsehood and fraud different from the other charges had been made out, and this charge must, as cumulative with them, be struck out. 2. For Brooks, it was contended, on the evidence, that he was not guilty of fabrication or forgery, in respect he was not even cognizant of the facts thereof. 3. It had been proved that the bills were not fabricated or forged in the way libelled ; and the bills were otherwise essentially mis-described. 4. This applied to destroy the charge of uttering, which charged the panels with uttering ‘ the said bills,’—the bills which had been previously mis-described. The charge of uttering, to be good in this state of the facts, would require to have contained a clause to this effect—‘ the said bills ‘ having been otherwise forged and fabricated in a manner to the prosecutor unknown,’ you did utter, &c. 5. M’Phun’s statement about the authority he had got in prison was not to be looked at as it was not part of the case, and had only been admitted in consideration for the credit of the witness. No communication had been proved between M’Phun and either of the prisoners subsequent to his insertion of his name on mandates on the morning of the meeting. Therefore, the charge of uttering had not been made out. But, 6. The uttering was not perfect in point of law. Thomas had no authority to allow M’Phun to put his name on the mandates. That was within the province of a creditor alone. Thomas’ name being on mandates kept them within his legal control, and he did not put them beyond his control. It was not in his power to do so

without communicating with the creditor giving the mandate. Therefore, any general authority to M'Phun to act in the sequestration could not entitle him to insert his name in mandates without the creditor's authority. M'Phun's acts, unauthorised as was the case in the indictment, could not inculcate the panels.

7. The state of affairs, so far as regarded Thomas, was withdrawn from the Jury by Lord Ardmillan, in respect the evidence was not of such a nature as to connect him with its fabrication or uttering. For Brooks it was contended that there was no evidence to show he had anything to do with it, or even knew of its existence.

The panels, it was contended, must be acquitted on this indictment, which had not only not been proved, but had been disproved in every particular.

LORD ARDMILLAN said the defence was original, and at the same time so apt, as to be entitled to the greatest attention. On the evidence, he thought it would not be safe for the Jury to find the charge of forgery proved; and although the evidence upon the charge of fabrication presented the panels' case in a less favourable light, yet they would consider whether sufficient doubt did not exist upon it to enable them to come to the same conclusion upon it as with regard to the charges of forgery. It had been made out in the evidence that the forgery and fabrication of the bills was done otherwise than was detailed in the indictment. The bills were to this extent mis-described, and on this ground he suggested the above findings as the legal view of the result of the evidence following on the indictment. With regard to Thomas, he suggested to the Jury that there was no evidence to connect him with the fabrication or uttering of the state of affairs.

But as against both panels, the charge of uttering stood in a different position. There the previous mis-description of the bills did not vitiate the charge. The questions they had to consider were—(1.) Were the bill, forged and fabricated? (2.) Were they uttered?

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(3.) Who uttered them? As to the first, there was no doubt the panels had not suggested that the bills were genuine or true. Then as to the second, they were produced in a sequestration, and so uttered. As to the last point, M'Phun was the hand by which they were uttered. Was M'Phun in so doing acting under the authority of the panels? There could be no doubt of it. He disregarded the alleged authority given in prison, but M'Phun was arranged to be trustee, and empowered to do all he could to procure for himself the election. Part of the procedure necessary for this end was the production of these bills, &c., which gave him the control of the sequestration proceedings, and so tended to carry out the plan of the panels, viz., to obtain protection for Brooks. He was not prepared to withdraw from the consideration of the Jury the charge of falsehood and fraud.

The Jury unanimously found Brooks guilty as libelled, with the exception of forgery and fabrication; and Thomas guilty as libelled, with the exception of forgery and the fourth charge.

Sentence, four years' penal servitude to each panel.

HIGH COURT.

Present,

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1862.

THE LORD JUSTICE-CLERK,

LORDS ARDMILLAN AND NEAVES.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Mailland—*
Mailland-Heriot A. D.

AGAINST

JANE M'PHERSON OF DEMPSTER—*John Morison.*CATHERINE STEWART—*Badenach-Nicolson.*WILLIAM THWAITES—*Mair.*JESSIE CROOKS OF ANDERSON—*J. C. Smith.*

THEFT—SEPARATION OF TRIALS—MOTION FOR DELAY—AGGRAVATION—PREVIOUS CONVICTION—FOREIGN—DECLARATION—HABIT AND REPUTE.—Circumstances in which a motion, 1st, for separation of trials; and, 2d, for delay of the trial of one of the panels was refused.

2. *Held*—That a certificate or extract of a conviction of the crime of theft in an English Court is admissible in proof of an aggravation of previous conviction of theft.
3. *Objection* to the admission of a panel's declaration, that it did not set forth that the charge was explained to the panel, or that she was cautioned not to answer unless she chose—*repelled*.
4. The character of habite and repute a thief, *held* not to be established by proof that the panel had borne that character for a year.

JANE M'PHERSON OF DEMPSTER, CATHERINE STEWART,
WILLIAM THWAITES, and JESSIE CROOKS OF ANDERSON,
were indicted and accused—

No. 28.
Jane
M'Pherson
or Demp-
ster and
Others.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Theft, especially when committed by a person who is habite and repute a thief, and who has been previously convicted of theft; As also Reset of Theft, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Jane M'Pherson or Dempster, Catherine Stewart, and William Thwaites, are, all and each or one or more of you, guilty of the said crime of

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No. 28. theft, aggravated as aforesaid, actor or actors, or art and part; and
 Jane M'Pherson or Dempster and Others. you the said Jessie Clark or Crooks or Anderson are guilty of the said crime of theft, aggravated as aforesaid, or of the said crime of reset of theft, actor, or art and part: IN SO FAR AS, on the 26th day of September 1861, or on one or other of the days of that month, or of August immediately preceding, or of October immediately following, in or near the house in or near Rose Street, Edinburgh, then and now or lately occupied by John Anderson, now or lately residing there, and by you the said Jessie Clark or Crooks or Anderson, you the said Jane M'Pherson or Dempster, Catherine Stewart, William Thwaites, and Jessie Clark or Crooks or Anderson, did, all and each or one or more of you, wickedly and feloniously, steal and theftuously away take from the pockets or person of William Burton Marshall, merchant and drysalter in Liverpool, now or lately residing in Church Street, Egremont, Birkenhead, in the county of Chester, England, a bank or banker's note for twenty pounds sterling, five or thereby bank or banker's notes for ten pounds sterling each, and four or thereby bank or banker's notes for one pound sterling each, the property or in the lawful possession of the said William Burton Marshall: OR OTHERWISE, as regards you the said Jessie Clark or Crooks or Anderson, the said bank or banker's notes, or part thereof, having been time and place above libelled, stolen by the said Jane M'Pherson or Dempster, Catherine Stewart, and William Thwaites, or by one or more of them, or by some other person or persons to the prosecutor unknown, you the said Jessie Clark or Crooks or Anderson did, time and place above libelled, wickedly and feloniously, reset and receive the said bank or banker's notes, or part thereof, you knowing the same to have stolen: And you the said Jane M'Pherson or Dempster, Catherine Stewart, William Thwaites, and Jessie Clark or Crooks or Anderson, are, all and each or one or more of you, habite and repute thieves, and have been previously convicted of theft.

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Among the productions libelled was—

A certificate or extract of a conviction of the crime of theft obtained against you, the said William Thwaites, before the General Quarter Sessions of the Peace for the county of the burgh and town of Berwick-upon-Tweed, at Berwick-upon-Tweed, on the 20th day of October 1854; as also a book, titled 'The Sessions Book,' beginning on or about 7th April 1854, containing the said conviction, obtained against you, the said William Thwaites, as aforesaid, on the said 20th day of October 1854, being to be used in evidence against you, the said William Thwaites.

This was the only previous conviction charged against Thwaites.

When the diet was first called against the panel, on the 16th December 1861,—

MAIR, for the panel Thwaites, moved for separation of his trial from that of the others, on the ground—(1.) That he might have the benefit of the women's evidence. The offence charged, if committed at all, was committed in the house of one of the other panels, while the panel Thwaites was not present. (2.) That the Sessions book libelled was not yet produced, and the relevancy of the aggravation raised a very serious and new question.

The SOLICITOR-GENERAL answered—No sufficient cause has been shown for separating the trials. The first reason is no more than might be pleaded in any case where more than one panel is placed at the bar; and, 2d, The 'Sessions book' is in the hands of the witness who comes from England to prove the extract, and who refuses to give the book out of his custody.

The LORD JUSTICE-CLERK said,—The Court are of opinion that there are no grounds for separation. The first reason, that the panel Thwaites wishes to have the evidence of the other panels, must, if sound, be available in every case where there is more than one panel. Some special case must be shown, where the justice of the case requires the separation. As to the other ground pleaded, in regard to the 'Sessions book,' I cannot see how that can be a reason for separating the trials. The prisoner's counsel can take every competent objection to the admission of the book, when it comes to be tendered in evidence.

The Court refused the motion.

MAIR, for Thwaites, then moved for delay, on the ground that the 'Sessions book' was not produced, and he had no opportunity of examining it.

The SOLICITOR-GENERAL, for the prosecution, answered—The book could not be produced, because the authorities of Berwick-upon-Tweed would not part with it,

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ster and
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but a man was present with the book in his possession.

The LORD JUSTICE-CLERK.—We think this a bad ground for moving for delay. No delay would put the panel in a better position than he now is. The officer would go home with his book, and the panel's agent would just have to follow him.

The Court refused the motion for delay.

MAIR then objected to the relevancy of the aggravation of previous conviction as against Thwaites, on the ground of the conviction being in an English Court.

The Court repelled the objection as not being an objection to the relevancy, reserving its effect as an objection to the reception of the evidence of previous conviction, when tendered.

J. C. SMITH, for the panel Anderson, objected to the relevancy of the charge of reset, as the indictment did not state from whom the property was stolen.

The Court repelled the objection, on the ground that 'said bank notes' meant the notes in question, 'the property, or in the lawful possession, of W. B. Marshall.'

The Court, on the motion of the Solicitor-General, deserted the diet against the panels, *pro loco et tempore*.

The diet was this day called against the panels, on an indictment exactly the same as the former.

The panels pleaded not guilty.

As regarded the proof of the English conviction,—

ROBERT HOME deponed—I am Clerk of the Peace of Berwick-upon-Tweed. [Shown certificate libelled.] That certificate is signed by me. It is a certificate of a sentence of the Quarter Sessions of the borough of Berwick-upon-Tweed, of which court I keep the records, and act as the clerk, by virtue of my office, as Clerk of the Peace. The sentence of which this is a certificate, is entered in the Records. It is a true certificate. I have the Record Book of the Court with me. This certificate is in the ordinary form in which I certify sentences, and it would, in England, be received as evidence of the sentence, with only the additional evidence of a witness to prove its application to some

person. I am ready to point out in the Record Book of the Court, if required, the entry of the sentence to which my certificate applies. I was applied to by the Procurator-fiscal to produce the book, but it is my duty, as an officer of Court, to keep this book in my own custody, and not to part with it on any account. It was brought this morning from Berwick by my clerk (No. 29).

Cross-examined for the panel Thwaites.—The Judge who pronounced the sentence was the Recorder of the Town of Berwick.

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The SOLICITOR-GENERAL, for the prosecution, now proposed to prove the application of the sentence of the Quarter Sessions of Berwick to the panel Thwaites, and then to put the certificate in evidence.

M^{RAIR}, for Thwaites, objected to its admissibility. The only authority in favour of its admission is the case of *Kenneth Macrae*, Perth, April 1837, Bell's Notes to Hume, p. 33, tried by Lord Moncreiff. It would be unsafe to admit such a certificate, as we are not acquainted with the law of England, which differs from ours in many respects, and in this case differs from the law of Scotland, in so far as in that country an accessory after the fact is held guilty of theft, while in Scotland he would only be a resetter, Hume, ii. p. 56.

The SOLICITOR-GENERAL, for the prosecution, answered—There is here no question of jurisdiction. In Alison's 'Principles,' p. 304, we see that the practice of charging previous conviction was not very well settled till 1824—case of *John or Alexander Campbell*, High Court, June 3, 1822, P. Shaw's Justiciary Cases, p. 66. The proof of previous conviction, as an aggravation in cases of passing base coin is analogous, 24th and 25th Vict. c. 99, sect. 37.

LORD ARDMILLAN.—This is a very important and difficult question, and almost a novel one, and it well deserves the attention that has been bestowed on it; but, after the best consideration that I have been able to give it, I am of opinion that the objection is not well-founded.

We are here trying a case of theft, aggravated by

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previous conviction of theft, and we are trying it in the High Court of Justiciary, one of the Queen's Courts, administering the law in the Queen's name. The public prosecutor is Her Majesty's Advocate for Her Majesty's interest, and the accused is put to the bar to answer for a crime against the laws of this country. Now theft is a crime against the public law of the United Kingdom. It is a crime against the law of England as well as that of Scotland, and the Queen's Courts of both countries have jurisdiction to try persons accused of that crime. The aggravation of previous conviction, particularly, as in this case, the aggravation of the crime of theft by previous conviction of theft, is well known to our law. In considering a previous conviction as aggravating a present offence, there is no attempt to punish the person a second time. The aggravation is, in some sort, a quality of the actor reflected on the crime which we are to try, and this quality of the actor may be competently instructed by proof of his conviction of the crime of theft before any of the Queen's Courts competent to try that crime. The present case is not the same as that with which, in the argument of the panel's counsel, he has sought to identify it, viz., that of a conviction before a really foreign tribunal—French, Belgian, or German. This is not a conviction before that species of foreign tribunal, because here we have a conviction of theft before one of the Courts of the Sovereign of this realm; and we, sitting in another Court of the Queen, are trying a person prosecuted in the Queen's name for a crime of which the previous conviction is an appropriate and legitimate aggravation. If there was a common quality in the offence, which made it cognisable in all the Queen's Courts—if theft means the same thing in England as in Scotland—I can see no sound objection to proving a conviction in one of the Queen's Courts before another of these Courts, in order to instruct that quality affecting the actor in the crime we are trying, in consequence of which his crime

is of an aggravated character. And, in this view, I am confirmed by the terms of the Statute 13th Geo. III., c. 31, sect. 4,¹ already referred to, which has reference to the case of a person who has stolen certain things in one part of the United Kingdom, and has them in his possession in another part—(*reads section*). Now, I read this section as a recognition of two matters of great importance—1st, Of the common character or guilt of the crime of theft in both parts of the United Kingdom; and, 2d, Of the appropriateness of the words 'steal' or 'stolen' as applicable to the same act in both parts of the Kingdom.

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Then we have the analogy of the case of uttering base coin, which is a crime both in England and in Scotland, and in regard to which it cannot be disputed, that a person once convicted is, if he is again convicted, guilty of a second offence, of which the previous conviction is the aggravation. No doubt, these offences against the coin are created by express statute, and thus the illustration may seem stronger in favour of the pro-

¹ Statute 13th Geo. III. c. 31, sect. 4.—'And whereas it frequently happens in both parts of the United Kingdom, that persons having stolen, or otherwise feloniously taken away, money, cattle, goods, or other effects, carry the same into the other part of the United Kingdom, and there have the said money, cattle, goods, or other effects, in their possession or custody, and doubts have been entertained whether they could be indicted or tried in that part of the United Kingdom, as the original offence was not there committed, be it therefore enacted, by the authority aforesaid,—That from and after the passing of this Act, if any person or persons, having stolen or otherwise feloniously taken money, cattle, goods, or other effects, in either part of the United Kingdom, shall afterwards have the same money, cattle, goods, or other effects, or any part thereof, in his, her, or their possession or custody, in the other part of the United Kingdom, it shall and may be lawful to indict, try, and punish such person or persons, for theft or larceny, in that part of the United Kingdom where he, she, or they shall so have such money, cattle, goods, or other effects, in his, her, or their possession or custody, as if the said money, cattle, goods, or other effects, had been stolen in that part of the United Kingdom.'

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secutor than the present case. But the principle is the same in both cases. The essential qualities of the crime are the same in both countries, and the crime is an offence against the law of both countries. We cannot try an offence committed in England ; but inquiry into previous character ought not to be stopped because the previous conviction was in England. So, in the case of malice evinced in England, that malice may be instructed by proof of conduct in England in a trial for murder in Scotland. So also, the circumstances and conduct in England of a person coming to Scotland, and charged here with fraudulent bankruptcy, may be proved in the Scottish Court. I also think that, in a trial here for the crime of reset in Scotland for goods stolen in England, the theft in England could be proved here to support the charge of reset.

On all these grounds, though fully sensible of the delicacy and difficulty of the question, yet having the authority of Lord Moncreiff's decision on Circuit, I am for repelling the objection.

LORD NEAVES.—After every consideration I have been able to give to the matter, I have come to the conclusion that the evidence is not admissible, and that the objection ought to be sustained. There can be no doubt that if in any other foreign country the party had been sentenced for this offence, this Court would not have given heed to this previous conviction, and I am unable to see any ground for a different rule with regard to England. It cannot admit of doubt that an English sentence of any kind is not *probatio probata* in this country. It was admitted by the Solicitor-General that it would not be competent in this case to enquire whether, in regard to this previous conviction, the man had been justly or fairly tried, or whether he was not totally innocent. It might be true that, so far from being fairly tried, he was lawlessly oppressed ; but yet we are not to enquire into that, and we are asked to take the fact of his being so convicted in a foreign

country, as equally an aggravation of the offence with which he is now charged, as if he had been convicted in this country, where the previous conviction being recorded, would have been *probatio probata*. Now, I doubt whether the sentence of a foreign Court is a conviction in the sense of the law of Scotland—where we know only that there was a sentence pronounced, which might or might not be a just sentence. I take also this separate and additional ground of objection to this evidence, that, although there may be a general resemblance between theft and what is called larceny in England, I cannot overlook the fact that very different views of theft are taken in different countries. What is regarded as theft in one country might not be considered theft in another. There are several things that might be theft in Scotland that are not theft in England, and *vice versa*; and there are many nice questions as to what is theft and what is breach of trust; so that it is matter of uncertainty whether the crimes in the two countries are in substance the same.

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LORD JUSTICE CLERK.—I feel this to be a question attended with considerable difficulty, and I have so felt it from the first time that I heard the objection stated. My difficulty is increased by the difference of opinion that exists between your Lordships, so that the case comes to be decided by my vote. The charge against the panel is one of theft, committed in Rose Street in Edinburgh, and he is also said to have been previously convicted of theft—in other words, to be a convicted thief, and there is no question that the act of theft was committed within our jurisdiction. This is not a question of jurisdiction in any sense of the word, but only whether, on account of a conviction obtained against him in another part of the United Kingdom, the panel is rightly described as being in the position of a convicted thief, when he committed the act of theft libelled in this indictment. In support of the aggravation of previous conviction a certificate is produced, which bears,

No. 28. that William Thwaites was indicted (at the General
 Jane Quarter Sessions of the Peace for the Borough of
 M'Pherson Berwick-upon-Tweed) before the Recorder of the burgh,
 or Demp-ster and Others. for that he, on 7th September, 1854, one gold watch,
 High Court. etc., 'feloniously did steal, take, and carry away,' and
 Jan. 13. that he was convicted of the offence charged. Now, it
 1862. is not disputed that the Court of General Quarter
 Theft, &c. Sessions was a competent Court, nor that the Recorder
 was a competent Judge, to try this offence, nor is it
 alleged that he exceeded his jurisdiction. If this were
 a sentence of a foreign Court, in the ordinary sense of
 that term, there can be no doubt what our deliverance
 would be. Such a conviction cannot have effect here,
 for this, among other reasons, that it is not evidence
 of any offence against the public law of the sovereign
 power of this country.

But it is very different when the conviction is in one
 of the Courts of the United Kingdom—(1.) Because all
 criminal, as well as all civil, jurisdiction flows from one
 source, that is, from the Sovereign—we all derive our
 jurisdiction from the Queen; (2.) Because the sen-
 tences of all our Criminal Courts are put into execu-
 tion by the same authority, viz., that of the Queen;
 (3.) Because the prosecutor here is the Queen herself,
 acting through her law-officers, and she comes to repre-
 sent to us, that this person stands in the position of a
 convicted thief; and it would be an anomalous result if,
 when the public prosecutor, representing the Queen,
 makes a charge of this kind, he should not be allowed to
 libel a previous conviction for the same offence in a
 competent Court deriving jurisdiction from the same
 authority. I could easily understand a case in which
 such previous conviction would not be admissible, if the
 crime was not of the same quality in the two countries;
 but I do not think there is the least reason for suppos-
 ing, that there exists any essential difference between
 what constitutes theft in England and Scotland re-
 spectively; on the contrary, I think that the Act 13th

Geo. III. clearly shows that theft in its definition is the same in both countries. That being the case, I come to the conclusion, though not without hesitation, that we are bound to receive the evidence of this conviction as an aggravation of the offence charged against the pursuer.

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The objection was therefore repelled.

WILLIAM WHINNA, (shown certificate of conviction before the Berwick Court,)—I am Governor of the Jail of Berwick. The conviction applies to the panel. I was present at the trial, and saw the panel convicted and sentenced.

Cross-examined for the panel Thwaites.—Are you aware that the panel was convicted as an accessory after the fact?

The question was objected to by the Crown, and was disallowed.

On proof being led that Thwaites was habit and repute a thief, it appeared that he had been out of prison for only a year.

The Court held that this was not sufficient time to establish the character of habit and repute a thief.

J. C. SMITH, for Anderson, objected that her declaration could not be read, because it did not state that the charge was explained to her, and that she was cautioned that she was not bound to answer.

The Court, on the ground that a statement of what the magistrate did was not essential to the declaration, repelled the objection.

The Jury unanimously found all the panels guilty of theft as libelled, art and part, with the exception of the aggravation of habit and repute against the panel Thwaites, which they found not proven.

Sentence—Dempster, Stewart, and Anderson, each six years' penal servitude, Thwaites eight years' penal servitude.

Present,

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THE LORD JUSTICE-GENERAL,

THE LORD JUSTICE-CLERK,

LORDS IVORY, COWAN, ARDMILLAN, AND NEAVES.

JOHN MACDONALD, Suspender—*Maitland-Heriot A.D.—A. Moncrieff A.D.*

AGAINST

JOHN YOUNG, Respondent—*G. Young—Maclean.*

SUSPENSION—JURISDICTION—STATUTE 23D AND 24TH VICT. C. 151—MINES, REGULATION AND INSPECTION OF—PROCESS, CIVIL OR CRIMINAL.—A complaint by a Procurator-fiscal to recover statutory penalties for violation by the owner of a coal-pit of one of the general rules directed by the Mines Regulation and Inspection Act, to be observed in coal and ironstone-mines, is a civil proceeding; and therefore the Justiciary Court has no jurisdiction to entertain a suspension of a judgment of a Sheriff pronounced in such a complaint. *Question*, Whether a complaint to recover penalties for violation of the special rules established under the Act be civil or criminal?

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THE proceedings in this case originated in a complaint (20th September 1861) at the instance of the suspender, Procurator-fiscal at Airdrie, against the respondent, a coal-master, and one of the 'owners' of the Bargeddie coal-pit in Lanarkshire, to the Sheriff of Lanarkshire or his substitute at Airdrie, under the 23d and 24th Vict. c. 151, entitled 'An Act for the Regulation and Inspection of Coal-Mines.' The complaint narrated, that, by section 10 of the Act, it was provided that the following general rule should be observed in every colliery, coal-mine, and ironstone-mine, by the owner or agent thereof, viz. :—

' 1. An adequate amount of ventilation shall be constantly produced in all coal-mines, or collieries, and ironstone-mines, to dilute and render harmless noxious gases, to such an extent that the working places of the pit's levels, and workings of every such colliery

' and mine, and the travelling roads to and from such working places, No. 29.
' shall, under ordinary circumstances, be in a fit state for working, Macdonald
' and passing therein.' e. Young.

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And by section 22 of said Act it was, *inter alia*,
enacted, that—

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' If any coal-mine, colliery, or ironstone-mine be worked, and
' through the default of the owner or agent thereof, special rules have
' not been established for the same, according to the provisions of this
' Act, or the general rules or the special rules for such coal-mine,
' colliery, or ironstone-mine, by this Act required to be established,
' have not been hung up or affixed, or have not, after obliteration or
' destruction, been renewed or restored, as required by this Act, or
' any of such general rules or special rules, provisions of which ought
' to be observed by the owner and principal agent or viewer of such
' coal-mine, colliery, or ironstone-mine, be neglected or wilfully vio-
' lated by any such owner, agent, or viewer, such person shall be liable
' to a penalty of not exceeding £20.'

That by section 25 of said Act it was enacted, that

' All penalties imposed by this Act may be recovered in a summary
' manner before two Justices of the Peace, or in Scotland before the
' Sheriff having jurisdiction in that county or place where the offence
' is committed, in the manner prescribed by the law in that behalf,
' the information to be laid or action raised within three months after
' the commission of the offence; and it shall be lawful for one of Her
' Majesty's principal Secretaries of State to direct that any penalty
' imposed for neglecting to send or cause to be sent, notice of any ac-
' cident as required by this Act, or for any offence against this Act
' which may have occasioned loss of life or personal injury, shall be
' paid to or among any of the family or relations of any person or
' persons whose death may have been occasioned by such accident or
' offence, and not being a person or persons who occasioned or contri-
' buted to occasion the accident; or to any person or persons, not
' being the offender or offenders, who may have sustained personal in-
' jury occasioned by such accident or offence, as he may think fit;
' and, save as aforesaid, all penalties imposed by this Act shall, when
' recovered, be paid into the receipt of Her Majesty's Exchequer, in
' such manner as the Commissioners of Her Majesty's Treasury may
' direct, and shall be carried to, and form part of, the Consolidated
' Fund of the United Kingdom.'

It was stated in the complaint—That John Young,
senior, one of the owners under and as defined by the

No. 29. said Act, of the Bargeddie coal-pit or mine, had, as one
Macdonald of the owners aforesaid, neglected or wilfully violated
v. Young. the said first general rule provided by the 10th section
High Court. of the said Act, the provisions of which ought to have
Jan. 20. been observed by him, and had thereby incurred the
1862. penalty of not exceeding twenty pounds, provided by
Suspension. the said 22d section of said Act : ‘ In so far as, on 22d
 June 1861, or about that time, the said Bargeddie coal-
 pit or mine being then worked, the said John Young,
 senior, as one of the owners aforesaid, did neglect or
 wilfully fail and omit to constantly produce an adequate
 amount of ventilation in the main coal-workings there-
 of, and in particular, in or near the working-place there
 of David Kelly, a collier, to dilute and render harmless
 noxious gases therein, to such an extent that the work-
 ing-places of said coal-pit or mine, and the travelling
 roads to and from said working-places, would, under
 ordinary circumstances, be in a fit state for working
 and passing therein, and in consequence a quantity of
 fire-damp or other noxious gases accumulated in said
 main workings ; and in particular, in or near the said
 working-place there of the said David Kelly, and in the
 travelling roads to and from said working-place, and
 said fire-damp or other noxious gases, in or near the
 said working-place of the said David Kelly, were not
 diluted and rendered harmless, and the same exploded
 in consequence of being ignited by the unprotected
 lighted lamps of the said David Kelly, and William Gray,
 now deceased, then assistant fireman in said coal-pit or
 mine, which lamps were then at or near the entrance
 to the said David Kelly’s said working-place, or were
 ignited in some other way to the complainer unknown ;
 and in consequence thereof, the said David Kelly and
 the said William Gray were severely burned on their
 bodies, and the said William Gray died from the effects
 of said injury on the 28th June 1861.’

The complaint prayed the Judge ‘ to grant warrant
 ‘ to cite the said John Young, senior, to appear before

‘ you to answer to the foregoing complaint ; and upon
 ‘ his appearance, and admitting the facts before stated,
 ‘ or on his failure to appear, or upon proof of the said
 ‘ offence, to decern and adjudge him to pay to the com-
 ‘ plainer, to be accounted for by him to the Queen’s
 ‘ and Lord Treasurer’s Remembrancer of the Court of
 ‘ Exchequer in Scotland, such sum, not exceeding £20,
 ‘ as your Lordship may fix as the penalty incurred by
 ‘ the said John Young, senior, as above libelled.’

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The case came before the Sheriff-substitute, who pronounced an interlocutor granting warrant for service thereof and of his deliverance on the respondent, and to summon him to appear before him at Airdrie, with warrant to cite witnesses.

The respondent appeared, but objected to the relevancy of the complaint, in respect—(1.) that the case was incompetently brought as a criminal complaint at the instance of the procurator-fiscal as such ; and, (2.) that it was incompetent, in respect of its departure from the forms prescribed by law in the Sheriff-Courts in Scotland.

The Sheriff-substitute having heard parties, repelled these objections, and an appeal was taken by the respondent to the Sheriff. A proof was thereafter led before the Sheriff-substitute, and the parties having been heard thereon, the Sheriff-substitute pronounced the following interlocutor :—

‘ 18th October 1861.—The Sheriff-substitute having
 ‘ heard the prosecutor in support of the complaint, and
 ‘ the agent for the defender in defence, in accordance
 ‘ with the evidence adduced, finds the libel proved, and
 ‘ therefore convicts John Young, senior, complained
 ‘ upon, of the offence libelled as having occurred on the
 ‘ 22d June last, and therefore decerns and ordains the
 ‘ said John Young, senior, to make payment to the said
 ‘ complainer of the sum of £10 sterling, being the
 ‘ penalty hereby modified, and incurred by the said
 ‘ John Young senior’s neglect or wilful violation as libel-
 ‘ led, and decerns.’

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The respondent appealed to the Sheriff against this interlocutor also. Those appeals, having come before the Sheriff, the suspender maintained that the appeals were incompetent, as the judgments of the Sheriff-substitute were final.

The Sheriff, 12th November 1861, found the appeals competent, and appointed the parties to be heard on the merits. The complainer thereupon presented a note of suspension to the High Court of Justiciary against the interlocutor of the Sheriff, and pleaded, that 'on a sound construction of the Act 23d and 24th Vict. c. 151, the judgment of the Sheriff-substitute was not subject to review; and that, the interlocutor of the Sheriff was illegal, and ought to be set aside.'

At the calling of the case the respondent took objection to the competency of the suspension as a mode of review of the case in its present stage, citing Hume, vol. ii. pp. 509, 513; Erskine's Institutes, 4. tit. 2. sect. 20, and 4. tit. 3, sect. 8, to the effect that the advocacy was the proper process of review of an interlocutory judgment such as that suspended, and that suspension was only competent as a mode of staying a final sentence condemnatory. The Court deferred consideration of the point, and directed argument on the merits of the suspension.

The suspender argued—That the appeal to the Sheriff was incompetent on two grounds, (1.) As absolutely excluded by statute. (2.) Because the proceedings before the Sheriff-substitute were criminal. He referred to section 7th of the Act (interpretation clause), in which it is declared that 'the word Sheriff shall include Sheriff-substitute,' so that the complaint might have been brought before the Sheriff originally. Further, in section 25 of the Act quoted above, it was provided that the penalties imposed should be recovered in the manner provided by 'the law in that behalf.' Now 'law in that behalf,' in the section here referred to, was, it was maintained, the provision in the 5th and 6th Vict. c. 99.

That Act, 5th and 6th Vict. c. 99, was referred to in the preamble of the Act of 23d and 24th Vict., and the 5th section of the latter Act provided that the 'fore-going provisions' of the Act should be construed with the Act of 5th and 6th Vict. as one Act. Now section 17 of 5th and 6th Vict., declares that the prosecution for offences against its provisions may be laid before two Justices or the Sheriff; and (sect. 21) that if the prosecution be before the Justices, 'either party may appeal to the Quarter Sessions, and the judgment of the Quarter Sessions or Sheriff is to be final, and not open to review in any court whatever.' Under that Act there was no review by the Sheriff. If, therefore, the two Acts were to be read as one, it was clear that review was excluded. Further, the summary way in which the penalties were recoverable, indicated the intention of the Legislature that the proceedings should be rapid, and were inconsistent with allowing review.

But the review of the Sheriff was excluded by reason of the criminal nature of the charge. It was called an offence. The penalties imposed were *in vindictam publicam—in modum pænæ*. The Act 5th and 6th Vict. c. 99, sec. 18, provided imprisonment for non-payment of these. The Court of Session had recently held, in the case of *Bruce v. Linton*, Dec. 13, 1861, 24 D. B. M. 184, and other cases, which were prosecutions for similar penalties, that they were of a criminal nature, and excluded the person complained of as a witness in the case. A list of witnesses was not necessary in every criminal complaint. And although here the Sheriff-substitute had examined the accused, he did so in face of the complainer's opposition; and in doing so, committed a mistake.

YOUNG and MACLEAN, for the respondent, answered—That 'the law in that behalf' in the 25th section of the 23d and 24th Vict. c. 151, just meant the common form of legal process in the Justice of Peace and Sheriff-Courts. There was no reference to 5th and 6th Vict. c. 99. Indeed such reference was excluded. The Act 5th and

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6th Vict. made provision solely for the employment of *persons* in mines, and regulations thereanent. The first four sections of the present Act did the same. Then occurred the 5th section which was in these words : The foregoing provisions of this Act shall extend to all mines in Great Britain, and shall be construed with the said Act of 5th and 6th Vict. c. 99 as one Act. The second part of the present Act was headed 'Provisions for *Inspection and Regulation* of Coal-mines and Ironstone-mines.' The present Act was thus divided into two parts, the first relating to the same subject-matter as the Act of 5th and 6th Vict., and the second to matters of a totally different kind. The first part of the Act was incorporated with the former Act. No allusion was made to the former Act in the second part. There were no provisions for the regulation and inspection of mines in 5th and 6th Vict. c. 99. No general rules were enacted by it. There had been two Statutes prior to this one for the regulation and inspection of mines, viz., 13th and 14th Vict. c. 100 ; 18th and 19th Vict. c. 108, both of which had been repealed, which had been exclusively concerned with the matters treated of in the second part of the present Act, and both of which, without containing any provisions similar to those of 5th and 6th Vict. c. 99, had a similar clause to that in sect. 25th, viz., 'the law in that behalf.' It could not be said that they referred by that form of expression to the provisions of an Act, with the subject matter of which they had nothing in common.

Besides, when one Act was to be incorporated with another in its working provisions, it was done as the Home-Drummond Act, 9th Geo. IV. c. 58, was incorporated by and with the Forbes-Mackenzie Act, 16th and 17th Vict. c. 67, section 16.

The only questions which remained, then, were, Was the case civil or criminal ? and, Was the suspension a competent form of process ? The argument on the latter point was held as repeated. For determining the former

(supposing the Act 5th and 6th Vict. c. 99, excluded,) the Act 23rd and 24th Vict. c. 151, must be looked to. If the case was civil, the Justiciary Court could not interfere. It was clearly a civil process, for—(1.) The conclusion of the complaint was a craving for decerniture of sums of money. (2.) Decree following thereon would only be enforceable in the ordinary way, by extracting, charging, poinding, etc. (3.) No *term* could be set to the imprisonment which was necessary in criminal matters. (4.) The terms of the 22d section showed the civil character of this matter. The sanction for non-payment was only an additional penalty of so much per day. The distinction taken between the offences by owners, and agents, and viewers, and others engaged in more immediate management of pits, was very important. In addition to the part of the section quoted from the complaint there occurs the following : ‘ And also in ‘ case the default or neglect be not remedied with all ‘ reasonable dispatch after notice in writing, given by an ‘ inspector to the owner or agent of such coal-mine, ‘ colliery, or ironstone-mine, to a further penalty of £1 ‘ for every day during which the offence continues after ‘ such notice;’ and the section goes on to enact that any person, other than the above, who neglects or wilfully violates any of the special rules, established under sect. 11 of the Act, for the conduct and guidance of the persons acting in the management of mines, and of persons employed in or about the same, shall be liable on summary conviction before two Justices, or in Scotland before the Sheriff, to a penalty not exceeding £2, or to be imprisoned with or without hard labour in the common jail or house of correction for any period not exceeding three calendar months. (5.) No personal criminality was involved in the neglect or violation of general rules or of the provisions of the 22d section. It was a constructive offence. (6.) The fact that death occurred from violation of rule was no element in the case. The

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No. 29. case would have been equally relevant without it. The
 Macdonald object of introducing the statement was for the apportion-
 v. Young. ment of the penalties provided for in section 25. (7.)
 High Court- The terms used in section 25 excluded the idea of this
 Jan. 20. being a criminal suit. It was a British Statute. The
 1862. word 'information' was applicable to English process.
 Suspension. But a criminal prosecution was never called an action in
 Scotland. (8.) The respondent had been allowed by the
 Sheriff-substitute to be a witness for himself. (9.) The
 proceedings under this Act were analogous to those
 under the Home-Drummond and Forbes-Mackenzie and
 other similar Acts, which were civil processes only cog-
 nizable by the Court of Session—*Phillips v. Steel*, Jan.
 12, 1847, 9 D. B. M. 319. (10.) There was no per-
 emptory diet fixed. The accused need not be within the
 jurisdiction of Sheriff. The test of jurisdiction was the
locus of the mine.

LORD JUSTICE-CLERK.—This bill of suspension com-
 plains of an interlocutor by the Sheriff of Lanark, pro-
 nounced on appeal taken against a judgment of his
 Substitute. The import and effect of the judgment
 complained of is to find that appeal competent. The
 question raised as to the competency of the suspension,
 is certainly worthy of mature consideration, and involves
 a point of much delicacy. It has been contended on the
 one side that this was a criminal proceeding before the
 Sheriff-substitute, and that there could be no appeal to
 the Sheriff against the Substitute's sentence awarding a
 penalty; on the other hand, it was contended that the pro-
 cess before the Sheriff-substitute was entirely a civil
 process; and that if steps taken by the Sheriff-substitute
 were more adapted to criminal than civil procedure,
 that only proves that the Sheriff-substitute went wrong;
 and it was further contended, as a corollary, that as
 this was a civil action, the appeal to the Sheriff was
 competent, and that we have no jurisdiction which en-
 titles us to interfere.

The question we require to solve is, whether, under

the Statute 23d and 24th Vict. c. 151, this process is civil or criminal. The Statute recites two previous Acts, 5th and 6th Vict. c. 99, prohibiting the employment of women and girls in mines, and regulating the employment of boys, &c., and 18th and 19th Vict., c. 108, an Act to amend the law for the inspection of coal-mines. It is apparent from the titles of these Acts that they refer to different subject-matters. This Act narrates that it is expedient that the provisions of these Acts be amended, and that the provisions for inspection, then applicable to coal-mines only, should be extended to certain mines of ironstone of the coal-measures. The enacting clauses of the Act come under two heads—the first is called ‘provisions applicable to all mines;’ there are only five clauses in that part of the Act; the first four apply to the employment of boys, women, and girls, in mines. The fifth section enacts that these provisions should extend to all mines in great Britain, and should be construed with the Act of 5th and 6th Vict. as one Act. This provision relates only to the four previous sections. The subject-matter of the second part of the Act is the same as of the Act 18th and 19th Vict., and that part of the Act consists of provisions for inspection and regulation of coal-mines and ironstone-mines. The first section repeals the 18th and 19th Vict., and proceeds to substitute improved regulations for the same purpose. Now, the clause we are called on to consider, is in this second part of the Act. We are not entitled to read any part of the provisions of the previous Act as applicable to the recovery of penalties under this Act. The 10th section gives fifteen *general* rules which are to be observed in all coal and ironstone mines by their owners and agents. These regulations all impose a duty and responsibility on the owner and agent of a mine. The second section makes provisions as to the *special* rules which are to be established in particular mines. These are to be adjusted by the Secretary of State and the

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owner of the mine, and the distinction between the general and the special rules must be kept in mind. The 22d section relates to penalties for offences against the Act. The first part of the section provides, that if, through the fault of the owner or agent, special rules have not been established, or the general rules or special rules have not been hung up or affixed, or have not after obliteration been restored, or if any of these rules which ought to be observed by the owner, agent, or viewer, be neglected by either, such person shall be liable to a penalty, and if the default or neglect be not remedied, after notice in writing by the inspector, there is a penalty for each day the offence continues. It is difficult to read these provisions without being reminded of the penalties under the Railways Acts, in which, as here, there is a penalty for every act of negligence, however short its duration, and also a penalty for continuing the neglect. These we have construed to be civil penalties, and *prima facie* the penalty provided in this case seems also to be a debt recoverable by civil action. But light is thrown on the question by what follows in the 22d section. The second part of the section applies to everybody employed in a coal or ironstone-mine, except the owner, agent or viewer, and what is said about them is, that if they neglect or wilfully violate any of the special rules, they 'shall for every such offence be liable upon a summary conviction for the same, before two Justices of the Peace, or in Scotland before the Sheriff having jurisdiction in the county or place where the offence is committed, to a penalty not exceeding £2, or to be imprisoned' for any period not exceeding three months. The party is to be summarily tried, and, if conviction follow, subjected to a penalty, or imprisonment in place of a penalty. That is as like a punishment following on an offence as anything can be. The first part of the section imposes a civil forfeiture, the second a punishment as for a criminal offence.

The 25th section provides for the manner in which penalties are to be recovered. It may perhaps be doubted whether the 25th Section applies to cases under the second part of the 22d section. The words seem inapplicable to criminal complaint or conviction. My impression is, that they do not apply to convictions under the second part of 22d section; reference to the 5th and 6th Vict. is excluded. I understand them as meaning that the ordinary common law procedure is to be followed. What kind of process, then, have we here? There is nothing of the nature of a criminal complaint except the name. The Sheriff-substitute seems to have been misled into the belief that this was of the nature of a criminal proceeding; because he finds the libel proved, and convicts Young of the offence libelled. The conclusion at which I arrive is, that as this is a purely civil matter, we in the Justiciary Court have no jurisdiction, and on that ground I am for refusing the suspension.

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The other Judges concurred.

The Court refused the suspension as incompetent, and found the suspender liable in expenses.

WILLIAM GRAY, Suspender—*D. M. Smith.*

AGAINST

JAMES MACKENZIE, Respondent—*A. Moncrieff.*

SUSPENSION—APPEAL—THREATENING LETTERS—INDICTMENT—VERDICT—EXPENSES.—An appeal to the next Circuit Court taken in open Court, under the Act 20th Geo. III. c. 43, in which caution had been found, but in which reasons of appeal had not been lodged, passed from, and the proceedings brought under review of the High Court by suspension.

Question, Whether or not the purport or object of the alleged threats must be set forth in the major proposition of the criminal libel in the Sheriff Court, charging the crime 'of sending threatening letters?'

Sentence proceeded on a verdict under the above charge, finding the panel 'guilty as libelled of writing letters of a threatening tendency,'—set aside with expenses.

Expenses of procedure in the Inferior Court refused as against the Procurator-fiscal, the sentence complained of having been moved for by him in deference to the opinion of the Sheriff-substitute who tried the case.

No. 80.
Gray v.
Mackenzie.
High Court.
Feb. 24.
1862.
Suspension.

IN this case the suspender complained of the proceedings against him under a criminal libel, in the Sheriff Court of Caithness, setting forth the crime of writing and sending threatening letters. The proceedings were at the instance of the respondent, Procurator-fiscal of Court. The major proposition charged the wickedly, maliciously, and feloniously writing and sending, or causing or procuring to be written and sent, any threatening letter or other communication. There was no allegation of the purport or object of the alleged threats. The minor proposition of the libel consisted of seven charges of writing and sending threatening letters.

The first diet under this libel was on the 26th Dec. 1861, when the following objection was stated to the relevancy of the libel :—'The major proposition is de-

‘fective in so far as it does not charge that the letters or
‘communications threatened any injury, or were written
‘and sent with any criminal purpose; and without some
‘specification of injury threatened, or criminal purpose,
‘the charge is inept.’

No. 30.
Gray v.
Mackenzie.
High Court
Feb. 24.
1862.
Suspension.

The Sheriff-substitute (Russell) repelled the objection, and found the libel relevant to infer the pains of law. The suspender having pleaded not guilty, a second diet was held on the 2d January 1862. The case went to trial, and the Jury returned this verdict—The Jury by a majority find the panel guilty as libelled, of writing letters of a threatening tendency under the first six charges, and find him not guilty as regards the seventh charge. Upon this verdict the suspender was sentenced by the Sheriff-Substitute to nine months’ imprisonment.

On the sentence being pronounced, the suspender, in terms of the Act 20 Geo. III. c. 43, intimated his intention of appealing to the next Circuit Court of Justiciary to be held at Inverness, and found caution under the appeal, and in consequence he was not imprisoned.

The suspender did not lodge reasons of appeal; but, instead of doing so, presented a bill of suspension to the High Court against the Procurator-fiscal, in which he stated that the appeal was abandoned, and on the presentation of the bill of suspension execution of the sentence was sisted without caution.

At advising, Smith for the suspender stated that he was informed that the sentence was not to be defended by the Crown, in respect the verdict did not find the suspender guilty of sending the letters, which was of the essence of the crime. He therefore moved that the sentence should be suspended *simpliciter*. No objection was offered to this motion.

As to the question of expenses—

D. M. SMITH for the suspender argued that he was entitled to expenses both in this Court and in the inferior Court. The major proposition of the libel was irrelevant as it did not set forth any proper crime or any crime known

No. 30.
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Mackenzie.

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1862.

Suspension.

in law. Letters of a threatening nature might be written for an innocent as well as for a criminal purpose. It was quite easy to forgive perfectly innocent letters containing threats. Thus, for instance, the suspender in his profession of a writer, as every man in the same profession did, wrote many letters of a threatening nature, but there was no crime in that, and it was therefore not to be assumed in a criminal charge that a letter containing threats amounted to a crime, or was written for a criminal purpose, unless there was in the libel an express allegation to that effect. Such was not alleged here, and therefore the suspender was entitled to the benefit of the presumption that the letters libelled were of an innocent nature. Besides, the term 'other communication' in a charge of writing and sending a threatening letter 'or other communication' was absurd, as 'other communication' might mean, as it here did mean, a communication not necessarily criminal. It was therefore of the substance of the charge to set forth the purpose in a distinct form. It had been suggested on the other side that, because in former cases where the purpose was set forth introduced by the term 'particularly,' that shewed that it was done by way of aggravation, the law recognizing the sending of threatening letters as constituting in itself a crime. But that was not true. It was only of late date that charges of this nature have been introduced, and they were always libelled as 'innominate offences,' depending as to their relevancy on the circumstances of each particular case, the term 'particularly' not being used to specify an aggravation, but merely to particularize the special sort of innominate offence meant to be charged. There was no substantive crime known to the law such as the limited one of merely sending threatening letters; and it was plain that it could not be affirmed that every letter containing a threat was necessarily of a criminal nature, a proposition which must be affirmed, otherwise the charge of merely sending threatening letters must fail as a

criminal charge, it followed that to make a libel relevant it was of the essence of the charge that the purpose should be distinctly set forth in the major proposition.

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As to the power and the practice of the Court to grant expenses in such cases, the suspender referred to Hume, vol. ii. p. 135, *note*; and to the cases of *Wilson v. Morrison*, High Court, June 15, 1844, Broun, vol. ii. p. 231; and of *Christie v. Adamson*, High Court, October 1, 1853, Irvine, vol. i. p. 293.

Suspension.

MONCRIEFF, for the respondent, answered—As the charge of writing and sending threatening letters without specifying the purpose, was well known and recognised in law, the libel was unobjectionable. The sentence, however, was objectionable, and could not be sustained, as the verdict on which it proceeded failed to find the panel guilty of writing and sending as charged in the libel.

In regard to the expenses, it was explained that the respondent, at the time, expressed to the Sheriff-substitute doubts whether the verdict was a competent one on which sentence could follow, but was overruled. It was therefore maintained, that the suspender ought not to be found liable in expenses.

The LORD JUSTICE-CLERK said—As the verdict could not be supported as sufficient to warrant any sentence proceeding on it, the Court were not disposed, and did not consider it necessary to determine, either that the libel was a bad libel, or, on the other hand, that it was relevant. With regard to the verdict, it appeared, and the statement had not been controverted by the suspender's counsel, that the respondent stated, at the time, to the Sheriff-substitute his doubts as to its validity, and proposed that the Jury should be reinclosed, in order that a proper verdict should be obtained. This suggestion was, however, overruled by the Sheriff-substitute, and in consequence the Fiscal moved for judgment, when the sentence complained of was pronounced. As the Court

No. 30. were not disposed to lay it down that it would have
 Gray v. been proper for the respondent to have acted otherwise
 Mackenzie. in opposition to the opinion of the local Judge, so they
 High Court. did not think it would be just to subject the Procurator-
 Feb. 24. fiscal in the expenses of the Inferior Court. With re-
 1862. gard, however, to the expenses in this Court, they must
 Suspension. fall on the Procurator-fiscal, as the suspension must be
 sustained.

The Court (Feb. 24, 1862) passed the Bill, and suspended the sentence *simpliciter*, and found the suspender entitled to the expenses incurred by him in this Court.

ADAMSON & GULLAND, W.S.—THE CROWN AGENT—Agents.

Mar. 21.
1862.

Present,

LORDS COWAN, ARDMILLAN, AND NEAVES,

WILLIAM SMITH, Suspender—*Watson—Hope*.

AGAINST

MAURICE LOTHIAN, Respondent—*A. B. Shand*.

SUSPENSION—PROCEDURE—SHERIFF COURT—STATUTE 16TH AND 17TH VICT. c. 80—INDICTMENT—RELEVANCY—PROPERTY OF STOLEN OR EMBEZZLED ARTICLES.—The relevancy of a libel in the Sheriff Court must be considered at the first diet, and therefore where an interlocutor sustaining the relevancy has been pronounced at the first diet, it is incompetent to state objections to the relevancy at the second diet.

2. A panel was charged with embezzling or stealing funds, the property of 'The Grassmarket Male and Female Yearly Society, or of 'the members thereof,' of which he was treasurer.—*Objection repelled*, that it was not sufficiently or relevantly stated who the owners of the property were, because the society was not registered, and had no *persona standi*, and the members were not named individually.

THE Suspenders was indicted before the Sheriff for Embezzlement and Breach of Trust, or otherwise for Theft :—

No. 81.
Smith v.
Lothian.

High Court.
Mar. 21.
1862.

Suspension.

IN SO FAR AS, he the said William Smith having been, during the period between the 9th day of October 1860 and the 8th day of November 1861, or part of said period, treasurer, or having acted as treasurer, to a Society commonly called or known by the name of the Grassmarket Male and Female Yearly Society, held in the house of the said William Smith, then at or near No. 12 Grassmarket, Edinburgh; and it being the duty of the said William Smith, and he having been entrusted as treasurer foresaid, to collect or receive the contributions or deposits payable to the said Society by the members thereof, and all sums of money which were payable to or receivable by the said Society, and to put such sums as were so collected or received by him the said William Smith into bank, for behoof of the said Society or members thereof, or otherwise faithfully to account therefor to the said Society or to the members thereof; and he the said William Smith having, as treasurer foresaid, collected or received during the foresaid period, or part thereof, from various members of the said Society, or for behoof of said Society, various sums of money, viz., sums in name of Deposit Money, to the amount of £126, 3s., or thereby; sums in name of Sick and Funeral Money, to the amount of £23, 3s. 10d., or thereby; sums in name of Children's Funeral Fund, to the amount of £2, 15s. 8d., or thereby; and Fines to the amount of 5s. sterling, or thereby; and Interest to the extent of £1, 12s. 9½d. sterling, or thereby, received from persons who had borrowed money from said Society, making together, or amounting in all, to the sum of One Hundred and Fifty-three Pounds Nineteen Shillings and Elevenpence sterling, or thereby, and which it was his duty, according to the trust foresaid, as treasurer foresaid, to put into bank, or to account for as aforesaid,—he did not put the same into bank, nor account for the same as aforesaid; and he did, on various occasions between the said 9th day of October 1860 and 8th day of November 1861, the particular occasion or occasions being to the complainer unknown, in or near the house in or near Grassmarket, Edinburgh, then or lately occupied by him the said William Smith, or at some other place or places in the city or county of Edinburgh to the complainer unknown, wickedly and feloniously, and in breach of the trust reposed in him as aforesaid, embezzle and appropriate to his own uses and purposes, the sum of Sixty-nine Pounds Eight Shillings and Ninepence sterling or thereby, being part of the foresaid sum of One Hundred and Fifty-three Pounds Nineteen and Eleven Pence sterling, or thereby, received by him as aforesaid, and did defraud the said Society out of the same : OR OTHERWISE,

No. 31. time or times, and place or places above libelled, he the said William
 Smith v. Smith, did, wickedly and feloniously, steal and theftuously away take
 Lothian. the said sum of Sixty-nine Pounds Eight Shillings and Ninepence
 High Court. sterling, or thereby, the said money so stolen or embezzled, and so
 Mar. 21. appropriated by him the said William Smith, being the property of
 1862. the said Society, or of the members thereof, and consisting of bank or
 Suspension. bankers' notes, or gold, silver, and copper coin, or of one or more of
 said kinds of money, the particular kind or kinds, or their respective
 amounts, being to the complainer unknown.

At the first diet, on 13th January, 1862, the Sheriff found the libel relevant, and allowed a proof; and the panel, on being then interrogated, pleaded not guilty; whereon the Sheriff appointed the trial to proceed at the second diet. It was stated in the suspension (afterwards presented) that at this first diet the suspender had no agent, and that no discussion took place on the relevancy of the charge.

At the second diet, counsel for the panel objected to the relevancy of the libel. The record of the proceedings bore that 'the Sheriff, in respect that the libel has already been found relevant by the judgment of the Court at first diet,' 'refuses to allow any objection to be stated to the relevancy as incompetent at this stage;' whereupon the panel pleaded guilty to the charge of breach of trust and embezzlement, and the Sheriff sentenced him to imprisonment for six months.

The suspender then applied by suspension to have the proceedings quashed, on the ground—1. That the second diet was the proper stage for disposal of the relevancy. The Sheriff-Court Act did not authorize the Judge to do anything at the first diet, except to take the plea of the panel, and pronounce sentence if he pleaded guilty. At least it was competent to object to the relevancy at the second diet, at which the trial of the whole cause was to proceed.

2. The interlocutor sustaining the relevancy was erroneous, because it was not competently or sufficiently stated to whom the money said to have been stolen or

embezzled belonged. It was said to be the property of the 'Grassmarket Male and Female Yearly Society, or 'of the members thereof.' If that society had been a registered friendly society, it would have been necessary to have described its funds as the property of the trustee or trustees of the society for the time being (18th and 19th Vict. c. 63, sect. 19). But it was not stated to be, and it was not in point of fact, a registered society; and, for anything that appeared, it might have been an illegal society, the existence of which the Court would not recognise, and which could not in the eye of the law be proprietor of money. Besides, as a mere unregistered society it could not have any *persona standi*. The only other description as to the ownership of the money was the alternative statement that it was the property of the members of the society, but that was vague and insufficient. It was necessary in a criminal libel to state the names of those to whom the things stolen were alleged to belong, or at least to describe them more specifically.¹

No. 31.
Smith v.
Lothian.
High Court.
Mar. 21.
1862.
Suspension.

As to the first objection—

LORD COWAN.—No answer is necessary. The procedure has been in accordance with the provisions of the Sheriff-Court Act, 16th and 17th Vict. cap. 80. At the first diet the panel is to be asked to plead to the charge and if he pleads not guilty, the trial is adjourned to the second diet. The relevancy is properly considered at the first diet, and must be sustained before the panel can be asked to plead; this is a very inexpensive mode of procedure, and the introduction of it in Sheriff-Court criminal procedure is a vast improvement;

¹ One of the learned Judges in this case is said to have summed up the six points of a good indictment in the following couplet:—

Quando, ubi, quo pacto, quid, quis commiserit, in quem,
Rectè compositus quisque libellus habet.

This, his Lordship, it is added, immediately turned into English:—

A libel shows us (if we follow Hume),
When, where, and how—who did what wrong to whom.

No 31.
Smith v.
Lothian.
High Court.
Mar. 21.
1852.
Suspension.

and I think it would be well if some similar mode of procedure were introduced in the Supreme Court.¹

LORD ARDMILLAN.—There cannot be two interlocutors on relevancy. The finding must necessarily be at the first diet before the panel is asked to plead. He cannot be found guilty unless the relevancy has been previously established; and there is no ground for admitting any other rule when he pleads not guilty.

LORD NEAVES.—I should have been sorry to have called for a reply, because the procedure here adopted is the only correct procedure. In old practice a panel was interrogated twice, whether he was guilty or not guilty—first, before the interlocutor of relevancy was pronounced, and secondly, afterwards. The first interrogation and plea had this effect, that the panel, by pleading, gave up all objections to the jurisdiction of the Court and the regularity of the citation. After the panel had thus pleaded to the merits, he could not object that he was not competently called before a competent court.

¹ The Act 16th and 17th Vict. c. 80, provides, section 38, that
 ‘ In the prosecution of all criminal offences which shall not be tried
 ‘ summarily, the will of the criminal libel shall contain two diets of
 ‘ compareance in the form of the schedule (L) hereunto annexed; and
 ‘ at the first of such diets, which shall not be sooner than five days
 ‘ from the service of the libel, the court sitting in judgment shall call
 ‘ upon the accused party to plead guilty or not guilty to the crime of
 ‘ which such party may be therein accused; and if such party shall
 ‘ plead guilty, the Court shall forthwith pronounce sentence upon such
 ‘ party, according to the form now in use; and if the party accused shall
 ‘ plead not guilty, the trial of such party shall take place on the second
 ‘ diet of compareance set forth in the will of the libel, which second
 ‘ diet shall not be sooner than nine days after the first diet, and at
 ‘ such second diet the party accused shall again be called on to plead
 ‘ as aforesaid, and if such party shall then plead guilty, the sentence
 ‘ of the law shall be forthwith pronounced according to the form now
 ‘ in use; and if such party shall plead not guilty, a jury shall then be
 ‘ empanelled, and the trial shall proceed and be followed out accord-
 ‘ ing to law, unless the diet shall be further adjourned or deserted ac-
 ‘ cording to the existing law and practice.’

It was the practice to record that plea, but not to authenticate it. The interlocutor of relevancy was then pronounced, and the panel was again interrogated. Then, if a plea of guilty was returned, it was recorded, and in our earlier practice the jury returned a verdict in terms of the panel's confession. The practice, though previously changed in the Supreme Court, was not altered in the Sheriff-Court till the late Sheriff-Court Act. By it the double interrogatory was dispensed with. When a plea of guilty is returned under the recent Act on which sentence may follow, which takes place at the first diet, all questions of jurisdiction, competency of citation, and relevancy, must necessarily be previously disposed of. The object of the Statute was to prevent discussion on legal questions at the second diet, and to leave nothing for the second diet except the examination of the witnesses and the trial of the cause. The panel is then allowed a second opportunity of pleading guilty, often a most desirable thing for him, as preventing exposure to the Court of all the details of his crime.

As to the second objection, the Court held that, looking to the fact that the panel was treasurer of the society whose funds he was said to have embezzled, he was sufficiently certiorated as to the ownership of the money.

The Court repelled the reasons of suspension.

WILLIAM M'CREADIE, Suspendor—*M'Laren*.

AGAINST

WILLIAM MURRAY, Respondent—*A. R. Clark*.

SUSPENSION — COMPETENCY — PROCEDURE — CIVIL OR CRIMINAL—
WEIGHTS AND MEASURES—STATUTE 5TH AND 6TH WILL. IV. c. 63—
JUSTICE OF THE PEACE.—QUORUM.—*Held*, that a conviction under the
Statute 5th and 6th Will. IV. c. 63, for having Light Weights in a
place where goods were kept for sale was a criminal proceeding, and
might be competently suspended by the High Court of Justiciary.

Reasons of Suspension.—(1.) that the warrant of citation was signed
by one Justice only; (2.) that one of three Justices who signed a
minute of adjournment in the cause was disqualified because he had
not taken the oath of office, *repelled*, on the ground, (1.) that a
warrant of citation might competently be signed by one Justice;
and, (2.) that two Justices were a quorum under the Act, and the
presence of a disqualified Justice (there being a quorum without
him) could not invalidate the proceedings.

No. 32.
M'Cready
v. Murray.
High Court.
Mar. 22.
1862.
Suspension.

THE suspension was presented against a conviction
pronounced on 15th November 1861 in Petty Sessions
by Justices of the County of Ayr, proceeding on a com-
plaint by the respondent, Procurator-fiscal at Girvan,
by which conviction the suspendor, a grocer in Girvan,
was convicted 'of having had in his possession, time and
' place charged, four iron weights, light or otherwise
' unjust, in contravention of the Statute 5th and 6th
' Will. IV. c. 63, as charged,' and was adjudged to pay
£2 of modified penalty, and in default of payment with-
in fourteen days to be imprisoned for forty days.

The principal grounds of suspension were—(1.) that
the warrant of citation was signed by one Justice only,
while it was contended that under the Statute, section
37,¹ the concurrence of two Justices was required in all

¹ The Statute 5th and 6th Will. IV., c. 63, enacts, section 37,
' That in Scotland, all penalties incurred under the provisions of this
' act, or of any of the before recited acts, shall be recoverable with
' expenses either before the Sheriff of the County, or the Magistrates

proceedings under the Act. (2.) That at the first diet when the complainer pleaded not guilty, and the case was adjourned, one of the three Justices who sat on the Bench, and who signed the minute of adjournment was not qualified to sit, because he had not taken the oath of office.

No. 32.
M'Creadie
v. Murray.
High Court.
Mar. 22.
1862.
Suspension.

The respondent objected to the competency of the suspension in the Justiciary Court, on the ground that the proceedings were civil.

On the question of competency—

CLARK, for the respondent, argued—Proceedings under this and similar Acts were civil, and suspension in the High Court was incompetent. For instance, suspensions of convictions under the Solway Fishing Act were proper to the Court of Session, and a person convicted of taking salmon in close time had been held entitled to the Act of Grace, thereby proving that his im-

' of the Burgh or Town Corporate wherein the same may be incurred, or where the offender may reside, or before two or more Justices of the Peace of such county, at the instance either of the Procurator-fiscal of court, or of any person who may prosecute for the same; and the whole penalties, after deducting all charges and such remuneration to the person prosecuting as the said Justices shall think fit, shall be applied in aid of the funds liable under the provisions of this act, to the cost of providing and maintaining copies of the Imperial Standard Weights and Measures in the place where such penalties shall be awarded; and it is hereby provided, that it shall be competent for the said courts respectively to proceed in a summary way, and to grant warrant for bringing the parties complained of before them, and upon proof on oath by one or more credible witnesses, or on the confession of the offender, or on other legal evidence, forthwith to give judgment on such complaint, without any written pleadings or record of evidence, and to grant warrant for the recovery of such penalties and expenses decerned for, failing payment within fourteen days after conviction by poinding, or by imprisonment for a period at the discretion of the Court not exceeding sixty days, it being hereby provided that a record should be preserved of the charge and of the judgment pronounced.'

No. 32. imprisonment was for a civil debt—*Park and others v. the*
 M'Creadie *Earl of Stair*, High Court, Jan. 12, 1852, J. Shaw,
 v. Murray. p. 532 ; *Robertson v. Collins*, Feb. 16, 1837. In the
 High Court. case of the *Duke of Richmond v. Dempster*, High Court,
 Mar. 22. 1862.
 Suspension. Jan. 14, 1861, Irvine, vol. iv. p. 10, in which the High
 Court entertained a complaint for contravention of 8th
 and 9th Vict. c. 26, that Court acted as a court of re-
 view. But here it was asked, as a court of original
 jurisdiction, to quash this sentence. In suspension of
 convictions under the Forbes-Mackenzie Act (16th and
 17th Vict. c. 67), the proper court was the Court of
 Session ; yet breaches of certificate under that Act might
 in many cases necessarily amount to an offence at com-
 mon law. For instance, a person was by his certificate
 prohibited from using weights and measures not autho-
 rised by the statute ; yet suspension of a conviction of
 breach of that provision of the certificate would require
 to be brought in the Court of Session ; that was closely
 analogous to the present case. That the sentence and
 warrant of imprisonment were in one and the same con-
 viction and deliverance, did not prove the proceedings
 to be criminal. They were so according at least to the
 practice in Glasgow in convictions under the Forbes-
 Mackenzie Act, and might be so under the Salmon-
 Fisheries Act.—*Macphail v. Campbell*, High Court, Mar.
 18, 1861, Irvine, vol. iv. p. 18.

On the merits—To issue a warrant of citation was a
 ministerial act which might be done, as was quite settled
 by one Justice. Then whether the Justice said to be
 disqualified was bound to take the oath or not did not
 signify, because there were two Justices (under the Act
 a quorum) without him ; and his neglect to take the oath
 did not invalidate his act—*Livingstone*, June 26th,
 1846, 8 D. B. M., p. 898, and 6 Bell's App., p. 469.

For the Suspender—It was not necessary, in order to
 vindicate the jurisdiction of the High Court, to maintain
 that the Court of Session would not have had power to
 entertain a suspension of this conviction. The Court of

Session had jurisdiction to repress all excess of power by inferior Courts, and to quash all sentences which were *ultra vires* of the Judges pronouncing them—*Mailland v. Douglas*, Court of Session, Dec. 12, 1861, 24 D. B. M., p. 193; *Evans v. M'Loughlan*, Court of Session, Feb. 18, 1859, 21 D. B. M., p. 532, and Feb. 21, 1861, 33 Scot. Jur., p. 293. But the Court of Justiciary had, notwithstanding, power to repress all excess of jurisdiction by inferior Courts in proceedings of a criminal nature.

No. 32.
M'Creadie
v. Murray.
High Court.
Mar. 22.
1862.
Suspension.

It was maintained that the proceedings were of a criminal nature, because—(1.) the offence charged was in its nature criminal; the use of light weights was a point of dittay—Hume, vol. i. p. 177. It was true that here the thing charged was not the use of light weights, but only the possession of them by a person keeping goods for sale, under section 28 of the Act. But the reason why the possession of light weights was prohibited by and punishable under the Act was, that possession tended to lead to the commission of the offence of using. It would be anomalous to hold that a proceeding under the statute for using light weights was criminal, and that a proceeding under the statute for possessing them was civil. (2.) The proceedings were maintained to be criminal because the fine was not payable to a party injured or to the complainer, but were payable into a public fund, established by the Act with a view of carrying out its provisions. Further, the steps of procedure were analogous to criminal procedure; the diet was peremptory, the proceedings were commenced by apprehension, the oath of one witness was declared sufficient for conviction, the judgment was described as a conviction, and the warrant of imprisonment was contained in the sentence.

On the merits—(1.) the Act contemplated that all proceedings under it should have the sanction of two Justices at least. (2.) The taking of the oath *de fidei* was a condition precedent of the power of a Justice of Peace, 1617, c. 8, sect. 8.

No. 32.
M'Creadie
v. Murray.
High Court.
Mar. 22.
1862.
Suspension.

The Court held the proceedings criminal, and the suspension competent; and on the merits—(1.) that the warrant of citation was competently signed by one Justice; (2.) that as there was a quorum of the Justices under the Act duly qualified, at the diet when the adjournment took place, the presence of the third Judge could not in any view invalidate the proceedings.

The bill was therefore refused.

DUNCAN & DEWAR, W.S.—CROWN AGENT.—Agents.

NORTH CIRCUIT.

April 18.
1862.

PERTH.

Judges—LORDS ARDMILLAN AND NEAVES,

HER MAJESTY'S ADVOCATE—*Shand A.D.—Kinnear.*

AGAINST

JAMES MOLYSON—*J. C. Smith.*

PROSECUTION—TIME OF TRIAL—LIBERATION—STATUTE 1701, c. 6.—

A prisoner committed on a charge of Forgery ran his letters, and was brought up for trial on criminal letters 146 days afterwards—Plea, that under the act 1701, c. 6, the Public Prosecutor was bound to complete the trial of a prisoner within 140 days after he had run his letters, and that therefore the prisoner was entitled to liberation, *repelled*, on the ground, that while the act 1701 entitled a prisoner to demand liberation within a certain time after he had run his letters if he was not served with criminal letters, that act did not in any way limit the Public Prosecutor as to the time when he might serve criminal letters.

No. 33.
James
Molyson.
Perth.
April 18.
1862.
Forgery.

In November 1861, James Molyson was apprehended on a charge of having forged and uttered six bills or bill-stamps. On this charge he was committed, and he immediately, or shortly thereafter, made application with a view to trial, under the Act 1701, c. 6, and obtained letters accordingly. He was afterwards charged with six other Acts of forgery, and another warrant of commitment was made out. No indictment was served

on him. But on 29th March he was served with criminal letters, charging him with the forgery and uttering of twelve bills or bill-stamps, intended to be filled up and used as bills.

No. 33.
James
Molyson.

Perth.
April 18.
1862.

Forgery.

On 2d May he was brought up for trial at the Perth Circuit on the criminal letters, 146 days having elapsed between the intimation to the public prosecutor under the Act 1701 and the date of the trial.

J. C. SMITH, for the panel, moved for his liberation, on the ground that he was illegally in custody, in respect he had not been brought to trial within 100 days from the date of the intimation to the public prosecutor. By the Act 1701, c. 6, the public prosecutor was required to fix a day for trial within sixty days after the intimation; and then it was required that the trial should be brought to a final determination within forty days, failing which the prisoner was entitled to liberation, 'unless there be new criminal letters raised before the Commissioners of Justiciary, and duly execute against the said prisoner.' The Act was no doubt obscurely expressed, and had at different times been differently interpreted. At the period immediately after it was passed, it had been held to limit the public prosecutor to 100 days for concluding the trial against a prisoner. But it was subsequently interpreted so as to give the prosecutor 100 days in which he might proceed by indictment, and 40 days more, during which he could proceed by criminal letters. But in no case had it been held that the prosecutor could have more than 140 days. Here 146 had elapsed.

The argument, that the right conferred by the Act on a prisoner was merely the right to be released from prison on the lapse of the 100 or 140 days, as the case might be, was ill-founded. Because, in the preamble of the Act it was declared that the object of it was to remedy the evil of 'delaying to put' prisoners 'to trial,'—an object which, of course, was not in the least accomplished, if the true reading of the Act were

No. 33.
James
Molyson.

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1862.

Forgery.

not that contended for; because, if the effect of the Act were not to force on a man's trial within the days specified, but merely to entitle him to liberation, leaving it open to the prosecutor to try him on criminal letters at any time before the years of prescription (applicable to crimes), the Act, of course, failed entirely of fulfilling its declared object—Burnett's Criminal Law, 356.

LORD ARDMILLAN.—The main purpose of the Act of 1701 was not merely to prevent undue delay in the trial of a prisoner, but to enable him to force his way out of prison if the public prosecutor did not proceed with the trial, in the form prescribed by the Act, within a certain time. And no doubt in this case the prisoner might have forced his way out of prison. No procedure could be taken against him under an indictment; but there is no valid objection to his trial under the criminal letters.

According to the more recent authorities applicable to the case where a prisoner has, under the Act of 1701, run his letters, the result is, that if the public prosecutor fails within sixty days to fix a day for his trial, then he is entitled to his liberation; and there his rights under the first part of the Act end.

But then Hume says: 'Although the prisoner has been released in respect of the failure to raise a process within the sixty days, yet a libel for the same crime, at the instance of the same informer, may be afterwards executed against him; and that, having thus given earnest of his resolution to insist without delay, the prosecutor, either at executing his criminal letters or afterwards, may have a warrant to recommit the accused in order to his trial. But, to guard against a long confinement, in this case the trial of this libel must be brought to an issue within forty days, which are here to be counted from the time of recommitment. If the trial is not finished within that period, the Court are then under the necessity of deserting the diet *simpliciter*, and the panel should be

'free for ever of all question or challenge touching the
'offence.'

No. 23.
James
Molyson.

The true protection which a prisoner has under this Act is protection against continued imprisonment; and, besides, if the prosecutor, after the lapse of the time during which he may proceed by indictment, serves criminal letters and blunders these, then the prisoner cannot be tried for the offence again. But the Act affords no objection to the trial proceeding under these criminal letters.

Perth.
April 18.
1862.
Forgery.

LORD NEAVES.—I am of the same opinion. This Act confers important benefits on prisoners. When a man is put in jail, he can call on the public prosecutor to fix a day for trial within a certain time, and to complete the trial within a certain time, and if the public prosecutor do not do so, the prisoner can have liberation. Then the public prosecutor can have one more chance. Taking his own time, and with all necessary care, he may proceed to serve criminal letters; and if any blunder occurs in prosecuting the trial under these criminal letters, then the prisoner escapes altogether. But the Act, although conferring these valuable privileges on a prisoner, gives no support to the objection which has now been taken.

HER MAJESTY'S ADVOCATE—*Shand A.D.—Kinnear.*

AGAINST

MAY GRANT—*W. A. Brown.*

MURDER—EVIDENCE—COMPETENCY.—In a trial of a woman for Child-murder, it was proposed, on the part of the Crown, to ask a woman, in whose charge the prisoner had been left for a short time by the policeman who had the prisoner in custody, what the prisoner had said to her, in reference to the alleged murder, in answer to a question put by the woman—Circumstances in which the question was *disallowed*.

No. 34.
May
Grant.
Perth.
April 18.
1862.
Child-
Murder.

THIS was a case of child-murder, in the course of which the Advocate-Depute proposed to prove an admission by the prisoner in the following circumstances : —The prisoner was apprehended by Turnbull, a criminal officer, and was brought by him to Pitlochry on their way to Perth. On arriving at Pitlochry, by which time they had already been some hours on the journey, Turnbull took his prisoner to the house of Young, a police officer, and left her for about half an hour in the charge of Young's wife. Young's house was also a police-station, and a number of witnesses had been brought there to identify the prisoner. The two women were left alone in the room, Turnbull standing outside the door. Mrs. Young began to fondle her baby, on seeing which the prisoner burst into tears, and Mrs. Young said to her—' I suppose you would be glad to ' have your own child again ?'

The Advocate-Depute proposed to ask Mrs. Young, who had deponed to the circumstances above stated,—' What was the prisoner's answer to that observation ?'

BROWN, for the prisoner, objected that her answer was not admissible in evidence, and that no statement of any further conversation that may have passed between the prisoner and witness ought to be received.

LORD ARDMILLAN.—I think this examination should not be allowed. It is beyond all doubt that Turnbull, having the prisoner in custody, could not have been permitted to prove any admission made by the prisoner to him in reply to an indirect question of this kind. Nothing elicited by him in such a manner could have been legitimate evidence, and I do not see that it becomes legitimate evidence, because, instead of being elicited by him, it was so by a woman to whose custody he had temporarily entrusted his female prisoner. Where is it that this conversation is said to have taken place ? In the dwelling-house of a policeman no doubt ; but in a dwelling-house which was also a police-station. It is proved that a number of witnesses had been brought

there for the purpose of identifying this very prisoner. Now the prisoner is left alone in this house with a woman and child ; and if not for the purpose, at least with the effect, of working on the feelings of this prisoner—an ignorant Highland girl—the woman ostentatiously fondles the child, the prisoner bursts into tears, and it is then that questions are put to her, and answers elicited, on which the Advocate-Depute now proposes to found. I think these answers ought not to be admitted. They would not have been evidence if they had been elicited by Turnbull. They would not have been evidence if they had been elicited by the other policeman, Young, and they cannot be evidence when elicited by the wife of Young, in whose custody the prisoner really was for the time. To sustain such an inquiry might allow a woman to be entrapped into a confession.

I do not believe that anything improper or unfair was intended on this occasion ; but the safe course is, under these circumstances, to stop the inquiry.

The ADVOCATE-DEPUTE then withdrew the case.

No. 34.
May
Grant.
Perth.
April 18.
1862.
Child-
Murder.

ABERDEEN.

April 24.
1862.

Judges—LORDS ARDMILLAN AND NEAVES.

ALEXANDER EDWARD, Appellant—*Badenach-Nicolson*.

AGAINST

THE INVERNESS AND ABERDEEN JUNCTION RAILWAY, Respondents—
A. B. Shand.

APPEAL—RAILWAY—DOMICILE—JURISDICTION.—In an action against a Railway Company, the summons was served at Keith, in the county of Banff, and at Inverness the statutory domicile. The cause of action arose in the county of Elgin, and the action was brought in the Sheriff Small-Debt Court of Banffshire. The Sheriff-Substitute dismissed the action on the ground of no jurisdiction—*Held*, on appeal to the Circuit Court, that he was right in so doing.

No. 35.
Edward
v. The In-
verness and
Aberdeen
Junction
Railway.
Aberdeen.
April 24.
1862.
Appeal.

THIS was an appeal from a decision in the Sheriff-Court of Banffshire, under the following circumstances:—

The appellant, a farmer at Balgreen, near Keith in Banffshire, was the owner of a filly, which, on June 4, 1861, was pasturing on a field through which the respondents' line of Railway runs. The filly, frightened by the approach of one of the respondents' trains, over-leaped the Railway fence, got upon the line, and was killed by the train. The field on which the filly was pasturing was in the County of Elgin. The Railway Company have their principal office at Inverness, which is one of their *termini*, the other being at Keith, where also they have a station and carry on business.

Edward raised an action against the Company before the Sheriff of Banffshire, in his Small Debt Court at Keith, concluding for the sum of twelve pounds sterling as the value of the filly, the death of which, as he alleged, was caused by the insufficiency of the Company's fences at the point in question.

The Company took various preliminary objections to the action, and, amongst others, that the jurisdiction of the Sheriff of Banffshire was excluded not only at common law, but also by statute: at common law in respect that the accident took place in the County of Elgin, and by statute in respect that by the Company's Act of incorporation, section 47, it is expressly provided that 'the domicile of the Company in reference to all 'judicial proceedings and actions at law shall be held to 'be in Inverness.'

The Sheriff-substitute (Gordon) sustained the objection of want of jurisdiction, and dismissed the complaint, against which judgment Edward appealed to the Circuit Court of Justiciary.

BADENACH NICOLSON, for the appellant, argued—The Company had been served with a summons at Keith, and also for greater security at Inverness, their headquarters, and Keith being a principal station, and in the County of Banff, the company were liable to

the jurisdiction of the Sheriff of Banffshire; the cases of *The Aberdeen Railway Company v. Ferrier*, Court of Session, Jan. 28, 1854, 16 D. B. M., p. 422; and *Dick v. Great North of Scotland Railway Company*, Aberdeen, Oct. 8, 1860, Irvine, vol. iii. p. 616, were authorities in point. He contended that the appeal was competent, and that the Sheriff-Substitute was wrong in refusing to entertain the action.

No. 35.
Edward
v. The In-
verness and
Aberdeen
Junction
Railway.

Aberdeen.
April 24.
1862.

Appeal.

The Court did not call on the respondent to reply.

LORD NEAVES.—This is a case of some importance. Two matters are here brought under our consideration. (1.) Is this a competent appeal? Can we in this way compel as it were the Sheriff to do his duty by sustaining his jurisdiction? (2.) There is the question on the merits with which the first point is perhaps in some degree mixed up. As to the case of *Ferrier* which has been quoted to us, I have no doubt whatever of the soundness of that decision in the circumstances in which it was pronounced, and to which alone it is applicable. The case was that of a person contracting in or near Brechin, and who chose to bring his action against the Railway Company at Brechin. But I do not think that either that case or the case of *Dick* rules the present. In each of these the defender was cited at the place where the contract locally had its origin. I am not prepared to say that either of these cases would be authority for holding that any one having a claim against a Railway Company might cite that Company at any Station along its line. Here we have a particular statute, and it might be competent under it to cite the Company at Inverness. But in the present case the statutory domicile is in one county, the injury is committed in another, and the action is brought in a third. I hold in these circumstances that the Sheriff was right in declining his jurisdiction; and, further, I have very great doubt whether even had he held that he had gone wrong in doing so, we are entitled in the way here contended for to compel him to go right.

No. 35.
Edward
v. The In-
verness and
Aberdeen
Junction
Railway.

Aberdeen.
April 24.
1862.

Appeal.

I say nothing as to the question whether, the accident having occurred in Elginshire, the Company could competently have been summoned in that shire.

LORD ARDMILLAN.—I am of the same opinion, more especially as to the first point. I have great doubt whether we can interfere in this matter in the way here contended for, and I also doubt as to what may be called the *merits* of this case of jurisdiction. Neither the case of *Ferrier* nor that of *Dick* touch the present case. The Sheriff is the true judge ordinary of the bounds, and where the delict or origin of action is within his jurisdiction the defender is bound to answer ; but the appellant does not profess to show us any authority, or any reason apart from authority, for holding that the Railway is to be held responsible at every station along the line ; and where, as here, the cause of action is in Elginshire, the Company is cited at Inverness, and the action is brought before the Sheriff of Banff, I see no principle or authority for sustaining his jurisdiction. I cannot see that a railway company can be liable to be summoned in every county through which their line runs.

The Court dismissed the appeal with seven guineas of modified expenses, besides the dues of extract.

JAMES RICHARDSON, Solicitor, Keith—WILLIAM JOHNSTON, Solicitor, Keith—
Agents.

INVERNESS.

Judges—LORDS ARDMILLAN AND NEAVES.May 1.
1862.HER MAJESTY'S ADVOCATE—*Shand A.D.—Kinnear.*

AGAINST

CHRISTINA CRAIG—*Skelton—Sellar.*

CHILD-MURDER—INDICTMENT—RELEVANCY—MODUS.—Objection to the description of the *modus operandi* in a charge of Child-Murder repelled.

CHRISTINA CRAIG was charged with the crime of Child-Murder :—

IN SO FAR AS (time and place libelled), you the said Christina Craig having given birth to a living male child, did immediately, or soon after the birth of your said child, wickedly and feloniously, attack and assault your said child, and did grasp and compress the throat of your said child; and further, did dash or violently strike the head of your said child against the wall or floor or other part of a water-closet situated on the ground or basement floor of said house, or against the wall or floor or other part of a room known as the still-room, situated on the ground or basement floor of the said house; or did violently strike your said child on the head with some hard substance or weapon to the prosecutor unknown, whereby your said child had its skull severely fractured, and was mortally wounded, and in consequence, immediately or soon thereafter died, and was thus murdered by you the said Christina Craig.

No. 36.
Christina
Craig.

Inverness.
May 1.
1862.
Child-
Murder.

Counsel for the panel objected to the words, 'did grasp and compress the throat of your said child,' and argued that they should be struck out of the indictment. If strangulation had been libelled as the cause, or one of the causes, of death, these words would have been relevant. But the cause libelled was fracture of the skull, and that alone.

The Court repelled the objection.

The panel pleaded not guilty. The jury returned a verdict of culpable homicide, with a unanimous recommendation to mercy. The sentence of the Court was six years' penal servitude.

HIGH COURT.

June 9.
1862.

Present,

THE LORD JUSTICE-GENERAL,

LORDS COWAN AND DEAS,

HER MAJESTY'S ADVOCATE—*W. Ivory A.D.—Gifford A.D.*

AGAINST

ABRAHAM LANGLEY—*W. A. Brown.*

BIGAMY—INDICTMENT—RELEVANCY.—Objections to the relevancy of an indictment for Bigamy, on the ground that both marriages were irregular—*repelled.*

No. 37.
Abraham
Langley.

ABRAHAM LANGLEY, a fisherman in Eyemouth, was charged with the crime of Bigamy :—

High Court.
June 9.
1862.
Bigamy.

IN SO FAR AS, you having, on the 10th day of April 1859, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, within the house at or near Lamberton Toll-bar, in the parish of Mordington, and shire of Berwick, occupied by James Dixon, toll-keeper, been lawfully married to Elizabeth Purves or Purvis, daughter of, and now or lately residing with, Robert Purves or Purvis, tailor, in Eyemouth, in the Parish of Eyemouth, and shire of Berwick, the marriage ceremony having been performed by Andrew Lyons, tailor, now or lately residing at Walkergate Lane, Berwick-on-Tweed, and you having thereafter lived and cohabited with the said Elizabeth Purves or Purvis as your wife in a house in Eyemouth aforesaid, in which house you and the said Elizabeth Purves or Purvis resided together as husband and wife for six months or thereby, or for some other period to the prosecutor unknown; and the said Elizabeth Purves or Purvis being still alive, and your marriage with her still subsisting, you the said Abraham Langley did, on the 28th day of July 1861, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, within the said house at or near Lamberton Toll-bar aforesaid, occupied by the said James Dixon, wickedly and feloniously, enter into a matrimonial connection with Ann Dougal, now or lately residing in Eyemouth aforesaid, the marriage ceremony having been then and there performed by the said Andrew Lyons, tailor, and you

the said Abraham Langley did afterwards cohabit with the said Ann Dougal as your wife ; and all this you did, well knowing that the said Elizabeth Purves or Purvis was still alive, and that your marriage with her still subsisted.

No. 37.
Abraham
Langley.

High Court.
June 9.
1862.

Bigamy.

W. A. BROWN for the panel objected to the relevancy of the indictment—(1.) Because it charged the crime of bigamy upon the foundation of a previous marriage, which was not a regular marriage according to the law of Scotland ; whereas by that law it was necessary to infer liability for such a crime that the first marriage should have been regularly contracted. (2.) and alternatively with the first objection, because it charged the crime of bigamy upon the foundation of a previous marriage, which was not only not a regular marriage by the law of Scotland, but was not embraced within the specified modes by which marriage might be irregularly contracted. In the event of the marriage libelled on being sustained as one of the kinds of irregular marriages known to the law of Scotland, the second objection would take the form of an objection to the specification in the libel, in so far as the indictment did not set forth the names of the witnesses who were present at the marriage. (3.) By the Marriage Law Amendment Act, 1856, it was necessary in the declarator of an irregular marriage to set forth that one of the parties had resided in Scotland for twenty-one days previously, and the same principle must by analogy be held to apply to the charge of bigamy founded upon an irregular marriage. (4.) While the previous marriage was irregular, the crime was sought to be established by proof of a second marriage which was irregular also, and two irregular marriages did not make a relevant charge of bigamy. Reference was made to Hume, vol. i. p. 659 ; Alison, vol. i. p. 536 ; and the cases of *John Armstrong*, High Court, July 15, 1844, Broun, vol. ii. p. 251 ; *William Brown*, High Court, Dec. 24, 1846, Arkley, p. 205 ; *James Purves*, High Court, Nov. 20, 1848, J. Shaw, p. 124.

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Abraham
Langley.
High Court.
June 9.
1862.
Bigamy.

GIFFORD for the prosecution admitted that there had been no case exactly similar to the present, but the decisions in former cases led necessarily to the conclusion that the charge here was relevant. In the passage quoted from Hume that writer had in view a marriage by habit and repute, which was not the case here. The Court were here dealing with a marriage where there had been a formal celebration; and although that was not a legal celebration, it stood in a position altogether different from a marriage by habit and repute. There was no authority to support the objections. Apart from the law of the case, it would be highly inexpedient, on grounds of public policy to sustain objections which, if allowed, would give impunity to persons contracting any number of marriages, if only they avoided the regular form. He referred to the case of *William Sharpe* or *M'Fie*, High Court, July 10, 1843, Broun, vol. i. p. 568.

LORD COWAN.—There can be no doubt that the opinion, or doctrine, or statement of the law on this point given by Hume, has been to a considerable extent departed from in cases decided since his time. I think the allegation here that these persons were lawfully married is sufficient, and that it is enough to set forth in each instance a marriage valid by the law of Scotland. It seems to me that the judgment of this Court in the case of *Brown* is decisive of the present case. There, as here, the first marriage was irregular, and the decision directly contradicts the argument here maintained for the panel that the first marriage must be one *in facie ecclesiæ*. It is said that the case of *Armstrong* goes to show that this is a doubtful matter; had this been so, it might have been advisable to take the opinion of the whole Court, but I repeat that it seems to me this question was raised, and substantially decided in the case of *Brown*.

I apprehend that where a marriage, good by the law of Scotland, is entered into, all the consequences, criminal

as well as civil, follow from such a marriage. I cannot enter into the doctrine that a declarator is indispensable; we know that it is not so. But I must guard myself by this reservation, that there may be some kinds of irregular marriage which would not have this effect. I am not prepared, for example, to say that a marriage by *habit and repute* would be sufficient, because there is no distinct and definite time to which the exact commencement of such a marriage can be referred, and at which it can be said to have taken effect, and our law as to habit and repute is in many ways very peculiar. As to the question now before us, whether this indictment regularly sets forth bigamy, where it charges that crime as committed by the panel entering into a second irregular marriage, I am of opinion that it does, and that we must hold the indictment to be relevant.

No. 37.
Abraham
Langley
High Court.
June 9.
1862.
Bigamy.

LORD DEAS.—The indictment sets forth, that on the occasion of both the marriages libelled, ‘the marriage ceremony’ was performed by Andrew Lyons, a tailor, within a certain house in Berwickshire. Both marriages were admittedly irregular. Now, it has been decided that bigamy may be committed where one of the two marriages has been irregular, whether that marriage was the first or the second one; and I think it legitimately follows, that it may be bigamy although *both* are irregular. I must add, however, with Lord Cowan, that I do not think it necessarily follows that every description of irregular marriage will found a charge of bigamy. I cannot but see that there might be a difficulty in so holding as to marriage by habit and repute, or by promise *subsequente copula*. There may be difficulties in such a case, not so much in principle as in the nature of the proof required to ascertain the facts, and the doubtful nature of the questions of law involved, which might render it unsatisfactory to convict, and may go the length of founding an objection to the relevancy.

No. 37.
Abraham
Langley.
High Court.
June 9.
1862.

But while I reserve my opinion in such a case, I concur with your Lordships as to the relevancy of the indictment now before us.

THE LORD JUSTICE-GENERAL.—I concur. Whatever may have been the view taken of this question in the time of Baron Hume, who, according to his custom, here speculates and gives the arguments either way, it is clear that the decisions since 1843 exclude all dubiety as to such a case as the present. Here, no doubt, both marriages are irregular, but they are contracted at different times and places, and a ceremonial of some sort is gone through on each occasion. The case of *Sharpe* was that of an irregular marriage following on a regular marriage. The case of *Brown* was one of a first marriage being irregular. I agree with your Lordships, that where it has been decided that the *first* marriage may be irregular, and that the *second* marriage may be irregular, I see no room whatever for doubting that where *both* are irregular, an indictment for bigamy may be sustained. It has been decided that a charge of bigamy will lie where one of the marriages is irregular, whether that be the first or the second. I think this is really conclusive of the present case where *both* are irregular.

The case of *Armstrong* was a peculiar one, there being there an alternative, and a good deal may be said for the expediency in such a case of making the prosecutor fix on one or other alternative; but, on the whole, I have no hesitation in the present case in concurring with your Lordships.

The objection was repelled, and the indictment held relevant.

The panel pleaded Not Guilty, and the case went to trial.

The Jury unanimously found the panel guilty as libelled.

Sentence, three years' penal servitude.

Present,

June 23.
1862.

THE LORD JUSTICE-GENERAL,

LORDS NEAVES AND JERVISWOODE,

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Maitland—W. Ivory A.D.*

AGAINST

MARY SCALLY OR SCOLLY—*Badenach-Nicolson.*

MURDER—INDICTMENT—RELEVANCY.—In an Indictment for the murder of a child, the alternative, 'or did, in some other way to the 'prosecutor unknown, maltreat the said child,' struck out on the motion of the prosecutor.

MARY SCALLY OR SCOLLY was charged with the crime of Murder :—

No. 38.
Mary
Scally or
Scolly.

IN SO FAR AS, on the 3d day of March 1862, or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, at or near a part of the Forth and Clyde Canal situated between the bridge over said Canal, at or near Castlecary, commonly called or known as Castlecary Bridge, in the parish of Falkirk, and shire of Stirling, and the lock on said Canal commonly called or known as Wyndford Lock, in the parish of Cumbernauld and county of Dumbarton, and to the westward of the said Castlecary Bridge, the precise part of the said canal being to the prosecutor unknown, or at or near some other part of said canal to the prosecutor unknown, you the said Mary Scally or Scolly did, wickedly and feloniously, attack and assault a male child, then about four or five days old, now deceased, of which you were the mother, and which was then in your charge and custody, the same having no name, or having some name to the prosecutor unknown, and being illegitimate, or at least its paternity being to the prosecutor unknown, and did throw or push the said child into the said Canal, and did leave it there; in consequence whereof the said child was drowned and deprived of life, and the said child was thus murdered by you the said Mary Scally or Scolly : OR OTHERWISE, Time and Place above libelled, or at some other place in the county of Stirling or county of Dumbarton to the prosecutor unknown, you the said Mary Scally or Scolly did, wickedly and feloniously, attack and assault your said child, and did with your hand, or in some way to the prosecutor unknown, obstruct the respiration of the said child, and did suffocate or strangle said child, [or did,

High Court.
June 23.
1862.
Murder.

No. 38. in some other way to the prosecutor unknown, maltreat the said child],
 Mary by all which, or part thereof, you did bereave the said child of life,
 Scally or and the said child was thus murdered by you the said Mary Scally or
 Scolly.
 High Court. Scolly, and you did thereafter throw or put the body of the said child
 June 23. into the said canal.
 1862.

Murder. On the motion of Solicitor-General the words, ' or
 ' did, in some other way to the prosecutor unknown,
 ' maltreat the said child,' were deleted from the libel.
 The libel was then found relevant.

DAVID FERGUSON, Suspender—*Millar—A Mure.*

AGAINST

DAVID THOW, Respondent—*E. S. Gordon.*

SUSPENSION—STATUTE 4TH GEO. IV. c. 34, SECT. 3—MASTER AND
 SERVANT—PROCESS—PENALTY. --A farm-servant convicted in a
 Justice of the Peace Court of having deserted his master's service,
 was sentenced to imprisonment under the Act 4th Geo. IV. c. 34.
 The sentence suspended as being disconform to the statute, in re-
 spect that hard labour had not also been imposed.

No. 39. THE suspender had been engaged as a farm-servant by
 Ferguson the respondent from 28th October 1861 to 26th May
 v. Thow. 1862, being the old term of Whitsunday. Two days
 High Court. after entering the service he absented himself; and on
 June 30. a petition by his master to the Justice of Peace Court of
 1862. Forfarshire, narrating the relative section of the Masters
 and Servants Act, and setting forth the above facts, he
 was convicted of the offence charged, and sentenced to
 Suspension. fourteen days' imprisonment. The sentence proceeded
 on a finding that he had contracted to serve the peti-
 tioner ' from the 28th day of October to Whitsunday
 next.' The main grounds of suspension ultimately pleaded
 were—(1.) That the duration of the contract specified
 in the petition (28th October to Whitsunday O.S.) was
 different from that found proved by the justice, and it
 was essential to the validity of the conviction that the
 same contract should be specified in the conviction as in

the petition ; (2.) that the sentence was illegal, being
disconform to the relative provisions of the Statute, in
respect that imprisonment without hard labour had been
imposed on the prisoner.

No. 39.
Ferguson
v. Thow.
High Court.
June 30.
1862.

The section of the Statute founded on provides that
if it shall appear that the party complained against has
not fulfilled his contract, warrant may be granted 'for
'committing him to the house of correction or prison,
'to remain and be held at hard labour for a reasonable
'time, not exceeding three months.'

Suspension.

The Court repelled the first objection, holding that
even if the terms specified in the petition and sentence
respectively had been different, which did not appear,
it was enough to bring the case within the provisions of
the Statute that a subsisting contract for a certain term
of service had been proved, and that desertion had
taken place long before its fulfilment.

As to the second objection—

The LORD JUSTICE-GENERAL said—I think this objec-
tion ought to be sustained. It appears to me, that the
enactment in the clause referred to, is not complete till
you come to the provision regarding hard labour. It is
no good answer, that this particular prisoner has no reason
to complain of the non-fulfilment of that provision. The
duty of the Justices is to walk according to the statute,
which imposes one kind of punishment, and does not
leave it open to them to dispense with the hard labour.
This sentence not having been in conformity with the
statute, must therefore be suspended.

LORD NEAVES.—I concur. I think it is of the essence
of the imprisonment under the statute that it is to be
accompanied with hard labour. The statute has in
view the benefit of working men, and it is of vital
importance to them that the term of imprisonment
should be short. It is therefore not to exceed three
months. But it is of equal importance that their
habits of industry and their bodily strength should be
kept up while they are in prison, and therefore there is

No 39.
Ferguson
v. Thow.
High Court.
June 30.
1862.

the provision, that while there, they are to be held to hard labour. If that provision were alternative, there would be a temptation to Justices to dilute the character of the imprisonment by omitting the hard labour, and extending the term of imprisonment, consequences of which would be much worse for those subjected to it.

LORD JERVISWOODE concurred.

The sentence was therefore suspended, as disconform to the Statute. In consideration that the respondent had been put to unnecessary expense in resisting pleas that were not sustained, the suspender was allowed only the expenses of printing the bill of suspension and his additional plea in law.

J. NISBET, S.S.C.—J. WEBSTER, S.S.C.—Agents.

JAMES MINTY, Suspender—J. C. Smith.

AGAINST

JOHN SYMON, Respondent—A. R. Clark—W. M. Thomson.

SUSPENSION—STATUTE 13TH AND 14TH VICT. c. 33 (General Police Act, Sects. 337 and 361)—FINE—IMPRISONMENT.—Suspension of a Police Court sentence, imposing a fine for an assault, and decerning that, failing 'immediate payment' thereof, the offender should be imprisoned for six days, was sought on the ground that the sentence was in violation of sections 337 and 361 of the General Police Act, which only authorize the Magistrates to grant warrant for imprisonment 'until such penalty be paid.'—*Held*, That neither of these sections covered the case, but that the sentence was competent under section 345 of the Statute—Suspension *refused*.

No. 40.
Minty
v. Symon.
High Court.
June 30.
1862.

THE suspender was a dealer in stoneware in Macduff, and sought suspension of a sentence of the Police Magistrates of that burgh on various grounds, alleging that they had convicted him of assault without evidence, and were actuated by malice, &c. The ground to which the Court attached most importance was thus set forth :

The alleged magistrates pronounced the following sentence :—
'Macduff, 2d May 1862.—The Judges find the complaint relevant and proven, and therefore fine and amerciate the said James Minty in the sum of five shillings, and failing immediate payment thereof, ordain

‘ and decern the said James Minty to be imprisoned in the prison
 ‘ of Banff, for the period of six days from this date, and on expiry
 ‘ thereof, ordain him to be set at liberty, and for that purpose, grant
 ‘ warrant to constables of Court,’ &c. This sentence was illegal and at
 variance with sections 337 and 361 of the General Police Act, as after
 quoted,¹ because its terms were such as could or did not admit of the
 liberation of the complainer from prison during the period of imprison-
 ment prescribed, unless immediate payment of the fine was made so
 soon as the sentence was pronounced, whereas the Magistrates were
 only entitled, by the said sections of the Act, to pronounce a warrant
 ‘ for imprisoning him until such damages or penalty and expenses
 ‘ shall be paid.’

No. 40.
 Minty
 v. Symon.
 High Court.
 June 30,
 1862.
 Suspension.

The Court held that neither of the sections cited covered the case, in respect that a fine for assault is not a pecuniary penalty of the nature therein referred to ; but that the sentence was competent under the common law jurisdiction conferred on the Magistrates by the 345th section of the Statute.

The reasons of suspension were therefore refused.

J. O. MACQUEEN—ALEX. MORRISON, S.S.C.—Agents.

¹ Section 337 of the Statute enacts, *inter alia*,—‘ It shall be lawful
 ‘ to such Magistrate or Sheriff to proceed to the hearing of the com-
 ‘ plaint, and upon proof either by the confession or admission of the
 ‘ party complained against, or upon the oath of one credible witness,
 ‘ or more, and without any written pleadings or record of evidence, to
 ‘ convict or give judgment against the party complained against, and
 ‘ thereupon to decree, adjudge, and sentence him to pay the damages
 ‘ or penalty which have arisen or been incurred ; and the expenses
 ‘ attending the proceedings, and to grant a warrant for imprisoning
 ‘ him until such damages or penalty and expenses shall be paid.’

Section 361 enacts, that—‘ In case any pecuniary penalty authorized
 ‘ by this Act shall not be immediately paid or consigned in manner
 ‘ after mentioned, it shall be lawful to sentence the person found liable
 ‘ in the same to be imprisoned till such penalty be paid, but in no case
 ‘ shall the period of imprisonment exceed thirty days.’

Section 345 provides, that—‘ The Magistrates of Police of a burgh
 ‘ under this Act, or any one or more of such Magistrates, shall have
 ‘ jurisdiction in all matters arising in such burgh under this Act, and
 ‘ shall have all such and the like jurisdiction within such burgh, as
 ‘ any Magistrate of a Royal Burgh, or any Dean of Guild of a Royal
 ‘ Burgh has by the law of Scotland within the Royal Burgh in and
 ‘ for which he acts as such Magistrate or Dean of Guild.’

JOHN SNADDON, Suspender—*E. S. Gordon—Nevay.*

AGAINST

WILLIAM SPENCE, Respondent—*A. R. Clark.*

SUSPENSION—STATUTE 2D AND 3D WILL. IV. c. 68 (Day-Trespass Act),
—QUARTER SESSIONS—IMPRISONMENT IN DEFAULT OF PAYMENT OF
EXPENSES.—Circumstances in which suspension of a conviction under the Day-Trespass Act was refused, and—*Held*, (1.) That the Justices in Quarter Sessions have no authority to award imprisonment as a means of enforcing payment of the expenses of an appeal from a sentence by the Justices in petty sessions. (2.) That the portion of the judgment of the Quarter Sessions containing such an award was separable from, and might be omitted from view, so as to leave the affirmance by the Quarter Sessions of the conviction by the Justices, and a conviction itself, to remain good. The award of imprisonment, however, set aside.

No. 41.
 Snaddon
 v. Spence.
 High Court.
 June 30.
 1862.
 Suspension.

THIS was a suspension of a conviction obtained under the Act 2d and 3d Will IV. c. 68 (the Day-Trespass Act), in the Justice of Peace Court of Clackmannanshire, and of a judgment of the Quarter Sessions, by which the conviction was affirmed, and the appeal against it dismissed. The complaint in which the proceedings under suspension originated was presented by the respondent as Procurator-fiscal to the Justices of the Peace of Clackmannanshire, and charged the suspender, a surfaceman in the employment of the Stirling and Dunfermline Railway Company, with the offence mentioned in section 1 of the Statute, inasmuch as he had committed a trespass in pursuit of game on the lands of the railway company, in the daytime, on 4th November 1861. The original sentence adjudged the offender to pay a penalty of 7s. 6d., with expenses, and in default of payment within four days to be imprisoned for three weeks, unless these sums should be sooner paid. The Justices in Quarter Sessions affirmed that conviction, dismissed the appeal, and adjudged the offender

to pay the expenses of the appeal, and in default of payment thereof, along with the sums contained in the original conviction, within four days, to be imprisoned in the prison of Alloa for three weeks, unless said award of expenses should be sooner paid.

No. 41.
Snaddon
v. Spence.
High Court.
June 30.
1862.
Suspension.

The leading reasons of suspension were—(1.) By the 2d section of the Statute, convictions were only competent at the instance of the owner or occupier of the land in which the trespass took place, or of the Procurator-fiscal of the county, while here the complaint was at the instance of the respondent as Procurator-fiscal ; (2.) in the complaint the suspender was not relevantly charged with the statutory offence ; it was merely said that he became liable in the penalty or forfeiture provided by the Statute, as the punishment for the commission of such offence ; (3.) the limits of the statutory daytime, as specified in section 3 of the Statute, were not set forth in the complaint ; (4.) the proprietors of the land upon which the alleged trespass took place were not mentioned in the complaint ; (5.) the oath upon which the prosecution proceeded was not in conformity with the requirements of the Statute ; (6.) the suspender was not guilty of trespass under the Statute, inasmuch as he had entered and was upon the line of the railway in the discharge of his duties as surfaceman at the time when the trespass was alleged to have been committed ; (7.) the prosecution and conviction were unwarranted under the Statute, inasmuch as the party upon whose oath the suspender had been charged with the statutory offence was not the owner nor the occupier of the land in question, nor in the service of either, and could not therefore legally apprehend him, or interfere with him while on the land ; (8) the conviction did not specify the particular day on which the alleged trespass was committed ; (9.) the judgment of the Quarter Sessions was wrongous and illegal, in respect that, besides ordering and adjudging that the suspender should be dealt with and punished according to the conviction,

No. 41. it further ordered and adjudged that he should be im-
 Snaddon prisoned for three weeks, failing payment of the ex-
 v. Spence. penses of the appeal within four days. This was in
 High Court. violation of the Statute, particularly section 14th,
 June 30. 1862. which provides ' that the Court at such sessions shall
 Suspension. ' hear and determine the matter of the appeal, and
 ' shall make such order therein, with or without costs
 ' to either party, as to the Court shall seem meet, and
 ' in case of the dismissal of the appeal, or the affirmance
 ' of the conviction, shall order and adjudge the offender
 ' to be dealt with and punished according to the convic-
 ' tion, and to pay such costs as shall be awarded, and
 ' shall, if necessary, grant warrant for enforcing such
 ' judgment in common form.'

Answered for respondent—The designation ' procura-
 ' tor-fiscal for the county' was intended by the Legisla-
 ' ture to point out the procurator-fiscal to the Justices of
 the Peace, and prosecutions under the Act in Scotland
 had been invariably followed forth by that official, and
 by no other procurator-fiscal. The respondent had de-
 signed himself in the complaint ' Procurator-fiscal of
 ' Court for the public interest,' which was his proper
 designation in such a prosecution, and in accordance
 with Sheriff-Court and Justice of Peace Court practice.
 The allegations of the suspender were for the most part
 denied. In regard to art 8, the day in question was
 mentioned in the complaint, and the conviction was
 written on the same sheet of paper, bearing that the
 suspender had been found guilty of committing the
 offence ' day within mentioned.' Reference was made
 to section 12 of the statute, which provides ' that it shall
 ' not be necessary, in any proceedings against any person
 ' under this Act, to negative by evidence, any license
 ' consent, authority, or other matter of exception or de-
 ' fence, but that the party seeking to avail himself of any
 ' such license, consent, authority, or other matter of ex-
 ' ception or defence, shall be bound to prove the same ;'
 and to section 15, which provides, ' that no conviction

‘in pursuance of this Act, or judgment given on appeal
 ‘therefrom, shall be quashed for want of form, or be re-
 ‘moved by advocacy, suspension, or reduction, into
 ‘any superior court of law; and that no warrant of
 ‘commitment shall be held void by reason of any de-
 ‘fect therein, provided it be therein alleged that it is
 ‘founded on a conviction, and there be a good and
 ‘valid conviction.’ In regard to art 9, the sentence of
 imprisonment was not an additional punishment, but
 merely a repetition of the sentence appealed against,
 and was warranted by the 14th section of the statute.

No. 41.
 Snaddon
 v. Spence.
 High Court.
 June. 30.
 1862.
 Suspension.

The Court repelled all the reasons of suspension except the last, in regard to which they held that the Justices sitting in Quarter Sessions had no power to award imprisonment as a means of enforcing payment of the expenses of the appeal. They had the power to award additional expenses, and to give decree for them, and the Statute provided for caution being found; but they had no power to add to the conditions authorized by the Statute. That incompetency did not, however, vitiate the whole judgment and conviction. The affirmance of the original sentence was one thing, and the incompetent addition another, and separable from it.

The following interlocutor was pronounced:—

‘30th June 1862.—Pass the bill, so far as relates to
 ‘that part of the judgment of the Justices in the Court
 ‘of Quarter Sessions, by which the Justices adjudge the
 ‘suspender to be imprisoned for the period of three
 ‘weeks in default of the sum of £2 9s. of expenses
 ‘thereby found due not being paid within four days, and
 ‘suspend that part of the judgment accordingly: *Quoad*
 ‘*ultra* repel the other reasons of suspension: Find no
 ‘expenses due to either party.’

NORTH CIRCUIT.

Autumn 1862.

PERTH.

Sept. 29.
1862.*Judges*—THE LORD JUSTICE-CLERK AND LORD JERVISWOODE.HER MAJESTY'S ADVOCATE—*A. Moncrieff A.D.*

AGAINST

ROBERT LONIE—*J. C. Smith.*

CULPABLE HOMICIDE—CULPABLE AND FURIOUS DRIVING—INDICTMENT
—RELEVANCY.—*Opinion* that it is contrary to sound principle to
charge in the same major proposition Culpable Homicide and its
equivalent, 'Culpable and Furious Driving, whereby any of the
' lieges are bereaved of life.'

ROBERT LONIE was indicted and accused—

No. 42.
Robert.
Lonie.Perth.
Sept. 29.
1862.Culpable
Homicide,
&c.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Culpable Homicide; As also Culpable and Reckless or Furious Driving, whereby any of the lieges are bereaved of life, especially when committed by a person who has been previously convicted of culpable and reckless or furious driving, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Robert Lonie are guilty of the said crime first above libelled, or of the crime second above libelled, aggravated as aforesaid, actor, or art and part: IN SO FAR AS, on the 27th day of August 1862, or on one or other of the days of that month, or of July immediately preceding, on or near the public road leading betwixt Saint Andrews and Anstruther, in the shire of Fife, and at or near a part of said road at or near the road or entrance from said public road to Balmungo House, near Saint Andrews aforesaid, you the said Robert Lonie being the driver or in charge of a cart or other vehicle drawn by one horse, and having desired James Docherty, junior, son of, and then residing with, James Docherty, labourer, in Couttie's Wynd of Dundee, to fasten one of the draughts or other parts of the harness on said horse to said cart, or the said James Docherty, junior, being engaged in so doing, or having done so, you did, time and place above libelled, culpably and recklessly or furiously drive the said horse and cart, or other vehicle, and in consequence thereof the said horse and cart or other vehicle, or one or other of them, came in contact with the person of the said James Docherty,

junior, whereby he was thrown or knocked violently to the ground, and one of the wheels of the said cart or other vehicle passed over him; by all which, or part thereof, the said James Docherty, junior, was mortally injured, and in consequence died, on or about the 6th day of September 1862, and was thus culpably killed by you, or bereaved of life through the culpable and reckless or furious driving of you the said Robert Lonie, as aforesaid.

No. 42.
Robert
Lonie.

Perth.
Sept. 29.
1862.

Culpable
Homicide,
&c.

Counsel for the panel objected to the double charge in the major, on the ground that culpable and furious driving, by which some one was bereaved of life, being nothing else than culpable homicide, it was incompetent to charge the same crime twice over, by the transparent device of describing it as a periphrasis, for the purpose of proving a previous conviction. If it were competent, then it would be equally competent to charge robbery as theft by violence, in order to take advantage of previous convictions for theft.

The Advocate-Depute replied, and cited authorities to show that the point was settled.

The LORD-JUSTICE-CLERK said, that he considered the authorities conclusive against the objection, but that if he had been to decide it on principle, he would have sustained it.

LORD JERVISWOODE was of the same opinion.

The case went to trial, and the evidence showed that the deceased was riding on the top of the cart with the accused; that the cart was trotting down hill; that the deceased, either at the request of the accused or of his own accord, went down, and, while the horse was still trotting, endeavoured to put on the draught; that he stumbled and fell, and that the cart ran over him and inflicted mortal injury, tearing several of his ribs from the back-bone; that the boy, before he died, said he had been sent down by the accused, but that no blame was attachable to him. No attempt was made to prove the previous conviction for furious driving.

LORD JERVISWOODE directed the jury that if the prisoner merely permitted the prisoner to go down to try

to put on the draught, he was guilty of no fault, but that if he did desire or order him to go down, and thus recklessly put his life in peril, he was guilty of a *culpa* which, in the circumstances, warranted a verdict of guilty of culpable homicide.

The jury returned a verdict of 'Not guilty.'

HER MAJESTY'S ADVOCATE—*A. Moncrieff A. D.*

AGAINST

ELIZABETH DUNCAN AND ANN BRECHIN—*W. A. Brown.*

CHILD-MURDER—SEPARATION OF TRIALS—INDICTMENT—RELEVANCY.

—In an indictment charging Murder against two panels, and Concealment of Pregnancy alternatively against one of them—*Held*, (1.) competent, on the motion of the prisoner's counsel, to separate the trials to the extent of dealing with each charge separately; (2.) That neglect to tie the umbilical cord formed a relevant charge of Child-Murder as part of the *modus* generally set forth.

No. 43.
Elizabeth
Duncan
and Ann
Brechin.

Perth.
Sept. 29.
1862.

Child-
Murder.

ELIZABETH DUNCAN and ANN BRECHIN were charged with child-murder—

IN SO FAR AS you, the said Elizabeth Duncan, having, on a day betwixt the 21st day of July and 1st day of August 1862, been delivered of a living female child, you, the said Elizabeth Duncan and Ann Brechin, did, both and each or one or other of you, immediately, or soon after the birth of said child, then and there wickedly and feloniously attack and assault the said child, and did tie a ligature or ligatures round the neck of the said child, and did tightly compress the throat of the said child, and obstruct its breathing, and did fail and neglect to tie the umbilical cord of said child, in consequence of all which, or part thereof, etc.

There was an alternative charge of concealment of pregnancy against Elizabeth Duncan.

Counsel for the panel Duncan moved the Court to try the two charges separately. It was maintained that the Crown would fail to establish the charge of child-murder against both prisoners, and it was proposed to adduce the panel Brechin (the mother of the panel

Duncan), to prove a disclosure, with the view of meeting the alternative charge of concealment of pregnancy.

The motion was granted, and the prosecutor proceeded with the charge of child-murder against both prisoners.

For the panel Duncan the relevancy of the indictment was objected to, in respect that mere failure and neglect to tie the umbilical cord was not of itself an act that could be made the foundation of a criminal charge, unless the indictment set forth such failure and neglect as deliberate and wilful. They were not here so set forth. Failure and neglect to tie the umbilical cord, when wilful, was known in law as a specific and technical cause of death, and ought to have been so libelled.

The Court held the narrative in the indictment to amount to one *modus* only, and that the words 'wickedly' and 'feloniously' covered its different parts. The relevancy of the indictment was accordingly sustained.

From the medical evidence it appeared that the child had been born alive, and that it had been disinterred after it had been buried perhaps ten days. Putrefaction had taken place to a considerable extent. Round the neck of the child three tightly tied ligatures (one over the right ear) were found. There was no ecchymosis of the parts near the ligatures. On incision into the neck the medical men found no ecchymosis. The umbilical cord was separated at about one inch and a half from the navel. The medical men thought it had more probably been lacerated than cut. The medical men admitted that it was perhaps the most bloodless body they had ever seen. In their report, notwithstanding, they draw the inference that the child had died partly from suspended respiration, caused by the application of the ligatures, partly from loss of blood through the umbilical cord.

In their declaration the prisoners inculpated one another. Duncan said that at the birth of the child she became nearly unconscious, and that her mother,

No. 48.
Elizabeth
Duncan
and Ann
Brechin.

Perth.
Sept. 29.
1862.

Child-
Murder.

No. 43.
Elizabeth
Duncan
and Ann
Breachin.

Perth.
Sept. 29.
1862.

Child-
Murder.

who was present at the birth, took charge of the child. Brechin denied being present at the birth at all, and no proof of this was adduced. On the whole case the Lord Justice Clerk directed the jury that, whatever construction they might put upon the medical evidence, even if they were satisfied that a murder had been committed, there was no proof bringing it home absolutely to either of the prisoners. It might not be very clear which of them committed the murder, and in these circumstances it was their duty, whatever the miscarriage of justice, to acquit both.

Both prisoners were acquitted of the charge of child-murder, and the Advocate-Depute did not press the charge of concealment against the prisoner Duncan.

HER MAJESTY'S ADVOCATE—*A. Moncrieff A.D.*

AGAINST

JAMES HENDERSON—*W. A. Brown.*

FRAUDULENT CONCEALMENT OF PROPERTY—INDICTMENT—RELEVANCY—PERJURY—SENTENCE—*Held*, (1.) That it is not necessary, in the minor of an indictment charging fraudulent concealment of property by a Bankrupt, to set forth the names of creditors who have been defrauded, if the indictment set forth that a trustee had been appointed on the bankrupt's estate. (2.) That it is not necessary to constitute a relative charge of perjury that the facts, which the prosecutor sets forth and intends to prove against the panel, should be a direct logical contradiction of the bankrupt's deposition upon oath. (3.) A panel found guilty under the above charge sentenced to twelve months' imprisonment.

No. 44.
James
Henderson.

Perth.
Sept. 30,
1862.

Fraudulent
Conceal-
ment of
Property.

JAMES HENDERSON was indicted and accused—

THAT ALBEIT, by the laws of this and of every other well-governed realm, the Wicked and Fraudulent Concealment or Putting Away, Sale or Disposal of his Property or Effects, by a Bankrupt, for the purpose of Defrauding his Creditors; as also, Perjury, are crimes of

an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said James Henderson are guilty of the said crimes, or of one or other of them, actor, or art and part: IN SO FAR AS, you the said James Henderson having, for some time prior to 26th December 1861, been in the occupation of lands and premises in and about Falkland, in the parish of Falkland, and shire of Fife, and you having, prior to the said 26th December 1861, become insolvent, and your estates having been sequestrated by the Sheriff of Fifeshire on the said 26th day of December 1861, under the provisions of the 'Bankruptcy (Scotland) Act, 1856,' and Donald Hay, farina manufacturer in Cupar, now or lately residing at Hiltarvit near Cupar, in the county of Fife, having, on or about the 7th day of January 1862, been elected trustee on your said estates, and having been, by a deliverance of the said Sheriff, dated 10th January 1862, confirmed as trustee in the said sequestration; and you the said James Henderson having formed a fraudulent design to conceal, sell, dispose of or put away, property, or effects sequestrated as aforesaid, for the purpose of appropriating the same to your own use, and depriving your creditors thereof, or otherwise defrauding your lawful creditors, or the said Donald Hay as trustee foresaid, you did (1.) in pursuance of said fraudulent design, on the 12th day of March 1862, or on one or other of the days of the month, or of February immediately preceding, or of April following, wickedly, feloniously, and fraudulently carry off, conceal, sell, dispose of, or clandestinely put away, or cause or procure to be carried off, concealed, sold, disposed of, or clandestinely put away, Two Cows and a Horse, forming part of your sequestrated estates belonging to your lawful creditors, or to the said Donald Hay as trustee foresaid; and this you did in the knowledge that the effects above libelled formed part of your sequestrated estates, and with the wicked and felonious intention of defrauding your lawful creditors, or the said Donald Hay as trustee foresaid, by carrying or sending off, or causing or procuring to be carried or sent off, the property above libelled, from the premises then occupied by you at Falkland aforesaid, to Edinburgh, and by there selling or disposing of the two cows above libelled, or causing or procuring the same to be sold by Robert Forgie, cattle and sheep salesman, now or lately residing in Lauriston Place, Edinburgh, to some person or persons to the prosecutor unknown, and by selling or disposing of the horse above libelled, or causing or procuring the same to be sold, in or near Edinburgh, to some person or persons to the prosecutor unknown, and the prices obtained for the said two cows and horse were received and appropriated by you the said James Henderson to your own uses and purposes, whereby your lawful creditors, or the said Donald Hay as trustee foresaid, were defrauded and deprived of the said two cows and horse, or of the price or value thereof.

No. 44.
James
Henderson.
Perth.
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1862.
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Conceal-
ment of
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No. 44. Then followed the specification of four similar charges.
James
Henderson. The sixth charge was thus set forth :—

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FURTHER, you the said James Henderson having, on or about the 1st day of April 1862, been brought before Robert Sutherland Taylor, Esquire, Sheriff-substitute of the shire of Fife, within the Justice of Peace Court-room, County Buildings, Cupar, in the county of Fife, to be examined on oath in regard to your affairs, in terms of the ' Bank-ruptcy (Scotland) Act, 1856,' and having been solemnly sworn by the said Robert Sutherland Taylor to speak the truth, you did, time and place last above libelled, wickedly, knowingly, wilfully, falsely, feloniously, and deliberately, swear to facts and circumstances contrary to truth, knowing the same to be so; and, in particular, you the said James Henderson did, time and place last above libelled, at your said examination, wickedly, knowingly, wilfully, falsely, feloniously, and deliberately depon, *inter alia*, in the following words or to the following effect, with reference to the effects above libelled, or part thereof, which words were taken down at the time, and subscribed by you and by the said Robert Sutherland Taylor :—' Since my sequestration, I took a pony which belonged to me to Edin^r., and sold it there three weeks ago. I also took there & sold two cows. I got £9 some shillings for the pony; I got £11, less about 6s. of commission, for the two cows. I sold them because I had no meat for them, & had to get means to support my family. The salesman was Mr. Forgie, 106 Lauriston Place, Edinb^r. I sold the pony in the Grassmarket to a stranger. The money was expended in paying meat for the pony & three cows for the previous four months, or repaying loans I had got to purchase their food. I had borrowed for that purpose about £7 or £8, from Mr. John Kirkmichael, contractor, Perth, after my sequestration. I repaid him that loan since I came from Edinburgh. * * * I repaid Mr. Doig of Perth about ten pounds, which I was due him for said pony. * * * I can't tell where the cart & two ploughs are. I never handled them since the Inventory was taken, & I did not tell any one to take them away. I know nothing about twelve hair-bottomed chairs & a mahogany table which are in the Inventory. These belonged to my wife. I did not take them away, or remove them to Perth or anywhere else, since my sequestration. My wife sent them away or sold them, but I don't know what became of them. I did not get money for them, or any value. * * * No articles were bought back at the roup for me or my wife. And^r Taylor bought some things which he has allowed to remain in my house. These are not my property. Taylor paid for them. I did not give Andrew Taylor the money to pay for them. He did not tell me that he had bought them back for me or my wife. My wife did not give him money either;' whereas the truth is, and it will be proved, that

the facts sworn to by you the said James Henderson as above libelled, or part thereof, were false, and were known by you at the time of your examination upon oath to be so, inasmuch as the truth is, and you well knew, and it will be proved, that you had not paid seven or eight pounds, as stated in your said deposition, to Mr John Kirkmichael, contractor, Perth, meaning thereby John Carmichael, contractor, now or lately residing in South Street, Perth, but that you had applied the money received by the sale of the said pony and two cows, to your own use, and that you had not repaid £10 to Mr. Doig of Perth, meaning thereby Alexander Doig, cattle-dealer, now or lately residing in New Scone, in the parish of Scone, and shire of Perth, but had appropriated the money received by you as aforesaid to your own uses and purpose, and had not paid the said Alexander Doig any sum of money; and the facts sworn to by you the said James Henderson in regard to the cart referred to in your deposition above libelled, being the cart referred to in the charge fifth above libelled, were false, and were known by you at the time of your said examination upon oath to be so, inasmuch as the truth is, and you well knew, and it will be proved, that the said cart had been taken away from the said premises occupied by you in or near Falkland aforesaid, on or about the said 27th or 28th day of March 1862, by you the said James Henderson, and that you had taken the same to the premises in or near Strathmiglo aforesaid, then and now or lately occupied by the said Joseph Wishart, or to the premises in or near Strathmiglo aforesaid then and now or lately occupied by the said John Wishart; and it will be proved, that the facts sworn to by you, in regard to the ploughs referred to in your deposition above libelled, being the ploughs referred to in the charge second above libelled, were false, and were known by you at the time of your said examination upon oath to be so, inasmuch as the truth is, and you well knew, and it will be proved, that the said ploughs had been taken away from your said premises on or about the time libelled in said second charge, and that the same had been carried off and disposed of in the manner mentioned in said second charge; and the truth is, and it will be proved, that the facts sworn to by you as before narrated, in regard to the chairs and table referred to in your deposition above libelled, being the chairs referred to in the charge third above libelled, were false, and were known by you at the time of your said examination upon oath to be so, inasmuch as the truth is, and you well knew, that the said chairs had been taken away by you from said premises then occupied by you in or near Falkland aforesaid, and disposed of by you, on or about the time and in the manner libelled in said charge third above libelled; and it will be proved that the facts sworn to by you the said James Henderson in regard to the purchase of articles at the roup, and the payment thereof, referred to in your deposition above libelled, were false, and were known by you at the time of

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No. 44. your said examination upon oath to be so, inasmuch as the truth is,
 James and you well knew, that you had desired or employed Andrew Taylor,
 Henderson. farmer, in or near Falkland, in the parish of Falkland aforesaid, being
 Perth. the Andrew Taylor to whom you refer in your deposition as above
 Sept. 30. libelled, to purchase articles for you at the roup of your said seques-
 1862. trated effects, or part thereof, by the said Donald Hay, as trustee on
 Fraudulent your said sequestrated estates, which took place at Falkland on or
 Conceal- about the 28th day of March 1862, being the roup referred to in your
 ment of deposition above libelled, and that you had given, or that your wife
 Property. in your knowledge had given, the said Andrew Taylor money to pay
 for said articles purchased as aforesaid.

W. A. BROWN, for the panel, objected to the relevancy of the indictment—(1.) There was no proper specification in the major proposition of the creditors alleged to have been defrauded, in so far as the creditors were not named—*Dick and Laurie*, July 16, 1832, Scottish Jurist, vol. iv. p. 594 ; *John O'Reilly*, High Court, July 14, 1836, Swinton, vol. i. p. 256. (2.) That there was no relevant charge of perjury, as the facts of which the prosecutor gave notice to the panel that he was to prove against him did not constitute a complete and exact negative of the bankrupt's deposition upon oath. In the minor applicable to the charge of perjury, there was no such contradiction. The bankrupt, for example, deponed upon oath, ' I repaid Mr. Doig of Perth about ' £10 which I was due to him for said pony ; ' the proposition which the prosecutor gave notice that he would prove against the panel was, ' Whereas the truth is, that ' it will be proved against you that you had not repaid ' £10 to Mr. Doig, Perth.' The same want of correspondence applied to the other parts of the bankrupt's deposition.

A. MONCRIEFF, for the Crown, replied—The specification of the names of creditors alleged to have been defrauded was unnecessary, in respect there had been a trustee appointed on the bankrupt's sequestrated estate, who represented the whole body of creditors. In regard to the charge of perjury, he maintained that the propositions in the indictment did not instruct the want

of correspondence which was asserted by the prisoner's counsel.

The Court repelled the objections, and the case went to trial. The panel was found guilty, and sentenced to twelve months' imprisonment.

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Henderson.

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SOUTH CIRCUIT.

A Y R.

Oct. 1.
1862.

Judge—LORD COWAN.

HER MAJESTY'S ADVOCATE—*A. B. Shand, A.D.*

AGAINST

WILLIAM COWAN.—*Cowan.*

FORGERY—FALSEHOOD, FRAUD, AND WILFUL IMPOSITION—INDICTMENT—RELEVANCY.—Terms of an indictment which held irrelevant and insufficient to sustain a cumulative charge of falsehood, fraud, and wilful imposition.

THE offences libelled in this case along with forgery, were set forth in the major proposition as follows :—

No. 45.
William
Cowan.

' Forgery, as also the wickedly and feloniously using and uttering as genuine any letter, or other obligatory writing, having thereon any forged subscription, knowing the same to be forged; as also falsehood, fraud, and wilful imposition.'

Ayr.
Oct. 1.
1862.

Forgery,
&c.

The statement in the minor proposition set forth that the panel had written, or caused to be written, certain letters of guarantee in his own favour, and forged, or caused to be forged, and adhibited to them, the subscription of another person, and used and uttered them as genuine, knowing them to be forged, by delivering them as genuine to certain individuals who were ' introduced, in consequence of the false and fraudulent re-

No. 46.
William
Cowan.

Ayr.
Oct. 1.
1862.

Forgery,
&c.

' presentations contained in said letter of guarantee,' &c., to deliver to the panel certain goods, which he ' did ' fraudulently receive delivery of, and appropriate,' &c.

COWAN, for the panel, objected that the statements in the minor were not relevant, and were insufficient to support the charge of falsehood, fraud, and wilful imposition, as a separate offence from that of forgery. The acts specified were merely the completion of the first libelled offence.

The Court sustained the objection.

The panel pleaded Not guilty, and after evidence had been led, was found guilty, and sentenced to twelve months' imprisonment.

HER MAJESTY'S ADVOCATE.—*A. B. Shand A.D.*

AGAINST

WILLIAM M'CREADIE—*Maclean.*

EVIDENCE—RELEVANCY—FIRE-RAISING—Under an indictment, charging the panel with—(1.) wilful fire-raising, and (2.) wilfully setting fire to goods, his own property, with the felonious intent to defraud an insurance company by recovering the amount of insurance above their value, on the false pretence that the articles destroyed were really of the value for which they were insured, counsel for the panel objected to evidence being led to prove the removal of certain articles from the premises before the fire, as being an attempt to prove a different crime from that libelled. Objection *repelled*.

No. 46.
William
M'Creddie.

Ayr.
Oct. 2.
1862.

Wilful
Fire-raising.

WILLIAM M'CREADIE was indicted and accused—

THAT ALBEIT, by the laws of this and of every other well-governed realm, Wilful Fire-raising; As also the Wickedly, Wilfully, and Feloniously Setting Fire to any Stock-in-Trade, Goods, Furniture, and Effects, contained in any shop or house or other premises, with the Felonious Intent of Defrauding any Corporation or Company, or individual with whom an insurance of the same has been effected against damage by fire, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said William M'Creddie are guilty of the said crimes, or of one or other of them, actor, or art and part: IN SO FAR AS (1.) you the said William

M'Creadie being, time hereinafter libelled, tenant or occupant of premises situated in or near High Street of Girvan, in the parish of Girvan, and shire of Ayr, and then and now or lately the property of Matthew Morton, now or lately draper in or near Girvan aforesaid, John Dickie, now or lately seedsman in or near Kilmarnock, and Hugh Morton, now or lately seedsman in or near Kilmarnock, or of one or more of them, as trustees of the deceased William Morton, merchant in Girvan aforesaid, or the property of the heirs of the said William Morton, part of which premises you occupied as a dwelling-house and store, and in part of which you carried on business, time hereinafter libelled, as a grocer and spirit-dealer, or in some other or similar capacity, under the name of William M'Creadie, or of John M'Creadie, or under the firm or title of John and William M'Creadie, or of John M'Creadie and Company, you the said William M'Creadie being the sole or only party interested in such business, and you the said William M'Creadie having deposited, disposed, or placed lucifer-matches, paper, tar-twine, patent fuel or fire-lighters, and oil, or one or more of them, or other combustible substances to the prosecutor unknown, on the floor around the inside or back of the counter, and in other places in the said shop or premises in which you carried on business as aforesaid, in order that fire might be the more readily communicated to said premises, you did, on the 25th or 26th day of May 1862, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, wilfully, wickedly, and feloniously, set fire to the said shop or other premises, or part thereof, by applying a lighted match, or some other lighted or ignited substance to the prosecutor unknown, to other matches, or to paper, tar-twine, or patent fuel or fire-lighters, or other combustible materials in said shop or other premises, or in some other manner or by some other means to the prosecutor unknown; and the fire thus set or applied did take effect, and did burn or destroy the said premises, and particularly the doors and windows, flooring and roof of said premises, and the counter, or part thereof, which were fixtures therein, the property of the said Matthew Morton, John Dickie, and Hugh Morton, as trustees aforesaid, or of one or more of them, or of the heirs of the said deceased William Morton: LIKEAS (2.) you the said William M'Creadie being tenant or occupant of the premises, or part thereof situated and belonging as aforesaid, and having, prior to and at the 25th or 26th days of May 1862, carried on business therein as above libelled, and you having, on the 11th, 22d, or 27th day of November 1861, in the name or under the firm or title of John and William M'Creadie, grocers and spirit-dealers, Girvan, or under some other or similar name or firm, effected an insurance against loss or damage by fire with the corporation or company carrying on business under the firm or designation of the Northern Assurance Company, or with

No. 46.
William
M'Creadie.

Ayr.
Oct. 2.
1862.

Wilful
Fire-raising.

No. 46. William M'Creadie. <hr/> Ayr. Oct. 2. 1862. <hr/> Wilful Fire-rai- sing.	<p>James MacKenna, then and now or lately agent at Girvan aforesaid for said corporation or company, to the extent of £430 on stock-in-trade, shop furniture, fixtures, and utensils, in said shop and store, and to the extent of £70 on household furniture, bed and table linen, wearing-apparel, plate, and printed books, in said dwelling-house, said articles being represented as being then in said premises and belonging to you, or in your possession, or as belonging to, or in the possession of, John and William M'Creadie foreshaid, and which insurance was to continue in force for the period from the said 11th day of November 1861 to the 11th day of November, 1862; and you having, on or about the 11th day of December 1861, paid the premium and duty or sums of money to said corporation or company, or to the said James MacKenna, due at said 11th day of November 1861, and obtained a policy of insurance under the said name or firm or title of John and William M'Creadie, grocers and spirit-dealers, Girvan, but which was in reality for your own behoof; and the said insurance being at the time hereinafter libelled in force, and the said sums of £430 and £70 being both and each or one or other of them beyond the value of the property respectively insured or intended to be insured thereby, or at least beyond the value of such insured property as was within the said premises at the time hereinafter libelled, and you the said William M'Creadie having deposited, disposed, or placed lucifer matches, paper, tar-twine, patent fuel or fire-lighters, and oil or other combustible substances, on the floor around the inside or back of the counter, and in other places in the said shop or premises in which you carried on business as aforesaid, in order that fire might be the more readily communicated to the stock-in-trade, utensils, household-furniture, and other articles within said shop, dwelling-house, and store, you did, on the 25th or 26th day of May 1862, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, wilfully, wickedly and feloniously, set fire to the stock-in-trade, shop-furniture, fixtures, and utensils, and to the household-furniture, bed and table-linen, wearing apparel, plate and printed books, or to part thereof, belonging to you, or said John and William M'Creadie, or then in your possession, and contained in said premises, and insured as aforesaid, by applying a lighted match or some other lighted or ignited substance to the prosecutor unknown, to other matches, or to paper, tar-twine, or patent fuel, or fire-lighters, or other combustible materials in said shop or other premises, or in some other manner to the prosecutor unknown, and the fire thus set or applied did take effect, and did burn or destroy one or more casks, one or more sacks containing flour, various articles of grocery goods, several boxes of lucifer-matches, a quantity of patent fuel or fire-lighters, a quantity of oil or other liquid, one or more beds or bedsteads, a quantity of wearing apparel, one or more chests of drawers, one or</p>
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more chairs, one or more tables, and other articles, or part thereof, all forming part of said stock-in-trade, shop-furniture, utensils, and household-furniture, bed and table linen, wearing apparel, plate and printed books, belonging to you, or to John and William M'Creadie foreshaid, or then in your possession, and contained in said shop and house or other premises, and insured as aforesaid: And this you the said William M'Creadie did with the felonious intent of defrauding the said Assurance Corporation or Company, or the said James MacKenna, by recovering from one or other of them the amount of said insurance, or part thereof, above the value of said articles, on the false and fraudulent pretence that the fire so raised was accidental, and that the articles so burned and destroyed were really of the value for which they were insured.

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William
M'Creadie.

Ayr.
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1862.

Willful
Fire-raising.

In the course of the evidence for the Crown it was proposed to prove the fact of the removal of certain goods and other articles from the premises immediately before the date of the fire.

MACLEAN, for the panel, objected—this was substantially an attempt to prove a different crime from the one libelled. The fraud alleged to have been intended was the claiming upon the goods, &c., which were burned, a higher than their real value, by pretending that they were of the value for which they were insured. Only a part of the goods in the premises were alleged to have been destroyed by fire. The Crown would require to prove that the articles burned had been insured at more than their real value, and that they had been represented after the fire to have been of this value, before their case was made out.

The proposed evidence pointed to quite a different case, viz., to the fraud as consisting in the panel claiming upon goods which he had removed from his premises, and which were not there at the time of the fire. No such fraud was libelled. The fraud was the charge in the 2d count, as it was not otherwise, under this indictment, a crime to set fire to one's own goods—(Case of *Daniel Black*, High Court, January 9, 1857, Irvine, vol. ii. p. 583). As against the admissibility of the evidence under the 1st charge, reference was made to

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McCreadie.

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Fire-raising.

the same case, which it was maintained, was an authority to point. In this question the 1st charge was to be looked to as if it were the only one in the libel. In Black's case it had been decided that, under an indictment charging a person with wilful fire-raising, committed by burning the premises of another, it was incompetent to prove that the person had insured his own furniture and effects therein contained. The opinions of the Lord Justice-Clerk and Lord Handyside went to this, that while all evidence tending to instruct the fact of fire-raising was admissible, it was not competent to prove that there was in the view of the person charged with that crime, an object in so acting other than the fire-raising, such as the defrauding of an insurance company.

SHAND, for the Crown, replied—the proposed evidence was admissible in support of both charges in the indictment. With regard to its reception under the *first*, the case of *Black* was not an authority against it. In this case the removal of goods immediately before a fire in the premises occurred, was direct evidence of a charge of wilful fire-raising, and was not necessarily evidence in support only of that other charge which was here laid, viz., that the fire had been raised in these premises with a fraudulent intention. This brought him to the 2d charge. The proposed evidence was clearly covered by its terms. The construction that had been put upon its wording was too narrow. The fair reading of the 2d charge was, that a fraudulent claim was proposed to be made on the goods destroyed, as if they were of the whole value of the articles insured. This view of the construction of the indictment was aided by the fact that it was alleged that only part of the articles insured had been destroyed ; and it was in the narrative of the case that the amount of the insurance was greater than the value of the articles in the premises at the time of the fire. The fraud alleged, therefore, was, that for that part of the articles which was destroyed, the panel

claimed the amount for which the whole of the articles had been insured. The evidence proposed was therefore directly in support of the very fraud libelled. The case of *Black* did not apply, as it could not be said that there was a want of notice of charge of fraud ; and want of notice was the foundation of the judgment adverted to in that case.

No. 46.
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McCreadie.
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Fire-raising.

LORD COWAN held the evidence admissible in support of both charges. The fact that a panel had been discovered removing goods which had been insured, from his premises immediately before a fire, was most pregnant evidence that the fire had been wilfully raised. With regard to the 2d charge, the case of *Black* was not an authority against the reception of the evidence in support of it. The ground of that decision was that no notice had been given that the premises had been insured, and therefore the policies had not been allowed to be looked at. Here there was no such want of notice. The fact that a portion of the articles in the premises had been removed went substantially to the question whether the remaining part of the stock which was destroyed was of the value which was subsequently claimed. The fair meaning of the part of the indictment in which the fraud was described was, that the articles consumed were really not of the value claimed. It was relevant to this to inquire whether a part of the insured stock was removed prior to the fire.

The evidence was therefore admitted, and the case went to trial. The prisoner was found guilty, and sentenced to six years' penal servitude.

WEST CIRCUIT.

Autumn 1862.

GLASGOW.

Sept. 17.
1862.*Judge—LORD DEAS.*HER MAJESTY'S ADVOCATE—*Gifford A.D.—A. Mure.*

AGAINST

JESSIE MCINTOSH OR M'LACHLAN.—*A. R. Clark.—Maclean.—
Bannatyne.*

MURDER—DECLARATION—Objections to admission of a panel's declaration—(1.) That the husband of the panel had been examined by the Sheriff-substitute and Procurator-fiscal before she emitted her first declaration, and at a time when the Sheriff and Fiscal had no reason to suspect that the husband was in any way connected with the crime,—and that his declaration had been taken as a precognition by which to cross-examine the panel; (2.) That the three declarations taken from the panel were not proper declarations or voluntary statements at all, but a series of answers to questions put by the Fiscal as to a witness; (3.) That the examination of the panel had been oppressive in respect of the length of the declarations and the time occupied in the examination; and (4.) That the panel was subjected to unfair treatment under examination, in respect, as appeared from the second declaration, she was examined about certain articles then in the possession of the Fiscal, which were not shown to her till after the examination with reference to them had been concluded, and which had been done for the purpose of entrapping her into falsehood,—*repelled.*

No. 47.
Jessie
M'Lauch-
lan.

JESSIE M'INTOSH OR M'LACHLAN was accused of the crime of murder, as also theft—

Glasgow.
Sept. 17.
1862.

Murder.

IN SO FAR AS, (1.) on the 4th or 5th day of July 1862, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near the house or premises in or near Sandyford Place, in or near Glasgow, then and now or lately occupied by John Fleming, accountant, now or lately residing there, you, the said Jessie M'Intosh or M'Lachlan, did, wickedly and feloniously, attack and assault Jessie M'Pherson, otherwise Jessie M'Pherson Richardson, then a servant in the employment of the said John Fleming, and residing in the said house or premises in or near

Sandyford Place aforesaid, now deceased, and did with an iron cleaver or chopper, or other similar edged instrument, to the prosecutor unknown, strike the said Jessie M'Pherson, otherwise Jessie M'Pherson Richardson, one or more blows on the face and forehead, and several blows on the head and neck, and did inflict severe wounds on the face, head, and neck of the said Jessie M'Pherson, otherwise Jessie M'Pherson Richardson, whereby her skull was fractured, and she was otherwise seriously and mortally injured in her person; in consequence of which, or of part thereof, the said Jessie M'Pherson, otherwise Jessie M'Pherson Richardson, immediately or soon thereafter died, and was thus murdered by you, the said Jessie M'Intosh or M'Lachlan: Further, (2.) time and place above libelled, you the said Jessie M'Intosh or M'Lachlan, did, wickedly and feloniously, steal and theftuously take away from the said house or premises in Sandyford Place aforesaid, Six or thereby silver or other metal table-spoons; six or thereby plated or metal dessert spoons; six or thereby silver or other metal toddy-ladles; a silver or other metal fish-slice; a silver or other metal soup-divider; two or thereby silver or other metal tea-spoons; a plated metal sauce spoon; and six or thereby plated or other metal forks, the property or in the lawful possession of the said John Fleming; as also, A velvet cloak; a cloth cloak; a black silk dress; a brown or other coloured silk dress; a merino or other dress; a silk jacket or polka; and a plaid, the property or in the lawful possession of the said Jessie M'Pherson, otherwise Jessie M'Pherson Richardson, now deceased, or of her heirs, executors, and representatives, or of the said John Fleming.

No. 47.
Jessie
M'Lachlan.

Glasgow.
Sept. 17.
1862.

Murder.

Three declarations were taken respectively on the 14th, 16th, and 21st July last. The evidence with respect to them and the circumstances under which they were taken, was as follows :—

ALEXANDER STRATHERN, *Sheriff-substitute of Lanarkshire*, being shown the three declarations, deponed—They were emitted by the panel in my presence freely and voluntarily, when she was in her sound and sober senses, and after receiving the usual warning. *Cross-examined*—I think the husband of the prisoner who had been apprehended on a warrant, was examined first. The husband and wife were charged with the same charge. It came to be known to me that the husband had left Glasgow on the morning of the 4th of July, and did not return till late the following week. I cannot answer more distinctly as to when it became known to me that he had left Glasgow. The husband was examined first, his examination lasting within an hour. I think it was in the course of the examination that I came to

No. 47.
Jessie
M'Lauch-
lan.

Glasgow,
Sept. 17.
1862.

Murder.

know that he had been out of town. The wife was examined after the husband. I told her she might decline to answer any questions. Her examination continued, I think, four hours. The examination was taken in the usual way. The Procurator-fiscal asked the questions, so far as I allowed him, and I dictated the answers to a clerk. She was again examined, some articles having been found in the interval bearing on the case. The second examination was conducted in the same way as the first, but she volunteered an explanation which I thought it right to take down. The articles were shown while the interrogatories were put. Some introductory interrogatories were put first. These lasted only a few minutes. The declaration shows the time and place where the articles were shown.

JOHN GEMMEL, *Joint Procurator-fiscal of Lanarkshire*.—The first and second declarations were freely and voluntarily emitted by the panel when she was in her sound and sober senses, and she had received the usual warning. *Cross-examined*—I believe the husband of the prisoner was apprehended on the same charge. He was liberated immediately after the panel was examined. It was not known, though reported, that the husband had left town between the 4th July and the end of the following week. We had no means of ascertaining it.

. . Did you, as Procurator-fiscal examine the panel and her husband on one citation, with having committed the crimes of murder and theft? I did. I did not personally make inquiries after the husband, but I got reports from some of the criminal officers. Had you not got reports from some of the criminal officers prior to the examination? I may; and personally I made some investigation before he was examined. I had no reason to believe that he was out of town before that period. I cannot say I had no reason to doubt it. I heard he had been out of town from the morning of the 4th, and I had no reason to doubt he had been so. I was not satisfied it was true.

WM. HART, *Joint Procurator-fiscal, Glasgow*, being shown a declaration dated 21st July, deponed—It was made by the prisoner freely and voluntarily, when she was in her sound and sober senses, and after she had been duly warned.

The following was the part of the second declaration which was taken from the panel with regard to articles then in the possession of the Fiscal, before they were shown to her.

I know that the late Jessie M'Pherson had a black watered silk dress. She had another dress of silk, of a changing colour, with flounces, but with cotton cloth beneath. She had also a velvet cloak, the front of which was lined with blue silk; as also a drab cloth cloak. She had also a black dyed harness plaid. I do not know if she had

a black silk polka, but she told me she had one. The other articles of dress I have seen. I have not seen any of these articles of dress lately, either in her possession or anywhere else.

No. 47.
Jessie
McLauch-
lan.

On the articles being shown to the panel, she contradicted this statement, and admitted that she had had them recently in her possession.

Glasgow.
Sept. 17.
1862.
Murder.

After the oral evidence for the prosecution had been led, the Advocate-Depute proposed to read the declarations of the panel, when

CLARK, for the panel, objected to the declarations being admitted :—They were unfairly taken, and did not form the voluntary statements of the panel. The right of the Crown to take declarations had been greatly abused in this case, and to admit them would be oppressive to the prisoner and unfair. (1.) The husband of the prisoner had been apprehended on the same charge as the prisoner, and had been examined, though neither the Sheriff nor Fiscal had any reason to think he was connected with the murder ; that was unfair, and contrary to practice, and done with the view of obtaining information to aid in examining the prisoner. (2.) Then the so-called declarations could not with any truth be called the voluntary statements of the prisoner, but were extorted from her by a minute examination. (3.) It was oppressive to subject a prisoner to such a lengthened examination ; the taking of the first declaration occupied four hours and a half. (4.) There had been an endeavour to entrap the prisoner, because she was examined about certain articles of dress which, though in possession of the Fiscal, were not shown her till her declaration was concluded. These proceedings were unfair and oppressive, and totally inconsistent with the true object of declarations.

LORD DEAS.—I can only dispose of these objections upon the evidence before me—that which has been recorded in the cross-examination of the Sheriff-Substitute and the Fiscal. The evidence consists of the cross-examination of these two gentlemen, for Mr. Hart was not

No. 47.
Jessie
McLachlan.

Glasgow.
Sept. 17.
1862.

Murder.

asked any questions in regard to this point. Now, looking to that evidence, and taking all the declarations, I can find no ground for holding that, when the prisoner's husband was examined and his declaration was taken, he was known to be innocent—that his declaration was taken from him as a precognition. Both the one gentlemen and the other swore expressly that they did not know at that time of his being absent from town. There had been some statements about his being absent, but they were not satisfied that he had been or that he was in a position in which he could not be implicated. The Sheriff and Procurator-fiscal have sworn that distinctly, and we have no other evidence upon the point. That evidence certainly does not import that the Procurator-fiscal knew that the man was out of town at the time that the murder was committed. I cannot see that it was wrong on the part of the authorities to apprehend the prisoner's husband. If it had turned out that he had had anything to do with this crime—and I have no doubt that, had he not been absent, suspicion would have attached to him—great blame would have been attached to the authorities if they had not taken him into custody; and it is impossible for me to hold that they did wrong in taking the declaration of the prisoner, which they were, indeed, bound by their duty to do. The second ground is, that there are a great many questions which were put in the course of the declaration. That is nothing more than what is done in every declaration that is taken. The length of the declaration must depend, in every case, on the nature of the case; and in this case it was quite right that the prisoner should have the fullest opportunity of explaining everything that she could explain, and I think we will find that a great deal of it consists of explanations which I rather take it Mr. Clark will not willingly throw aside. His fourth ground of objection is, that questions were put about certain articles before they were shown to the prisoner, now the Sheriff says that she was shown articles in the course of her

examination, that there were some preliminary questions asked her before the articles were produced, but these did not occupy above two minutes. That is the Sheriff's evidence about the matter; and I do not think that, in my recollection, there was anything different in the Procurator-fiscal's evidence. In these circumstances, I cannot, with every desire to refuse evidence that is incompetent against the prisoner, see that there is any incompetency in reading these declarations as part of the case. The question now before me is whether I shall or shall not allow these declarations to be read. I cannot see any ground whatever, in point of law, for refusing to allow them to be read.

The jury unanimously found the panel guilty as libelled; and she was sentenced to death, but the sentence was afterwards commuted to penal servitude for life.¹

No. 47.
*Jessie
 M'Lauch-
 lan.*

Glasgow.
 Sept. 17.
 1862.

Murder.

Judge—LORD ARDMILLAN.

JOHN BUCHANAN, Appellant—*Trayner*.

AGAINST

THE GLASGOW CORPORATION WATER WORKS COMMISSIONERS,
 Respondents—*J. Burnet*.

APPEAL—COMPETENCY OF—STATUTE 1ST VICT. c. 41, (Sheriff Small-Debt Court.)—Circumstances under which appeal to the Circuit Court held incompetent.

THIS was an appeal against a decree pronounced in the Sheriff Small-Debt Court at Glasgow, in an action at the instance of the respondents for the sum of £7, 11s. 1d., being arrears of water rates due by the appellant for the years 1857-8, 1858-9, and 1859-60.

No. 48.
*Buchanan
 v. Glasgow
 Corpora-
 tion Water
 Works
 Commis-
 sioners.*

Glasgow.
 Sept. 19.
 1862.

¹ The circumstances under which this commutation of sentence was granted, formed the subject of a motion in the House of Commons: Appeal. April 24, 1863.—*See Appendix*.

No. 48.
Buchanan
v. Glasgow
Corpora-
tion Water
Works
Commis-
sioners.

Glasgow.
Sept. 19.
1862.

Appeal.

The reasons of appeal insisted on were—(1.) The claim sued for was prescribed, and the Sheriff had erroneously repelled this plea. (2.) The Sheriff had decerned against the appellant although no evidence was adduced in support of the claim, nor productions made in support of the charges embraced in the account.

Other reasons were stated in the appeal, but withdrawn.

BURNET, for the respondents, objected to the competency of the appeal. Even assuming that the Sheriff had erred in law as to the plea of prescription, which he denied, an appeal on that ground was excluded by the Small-Debt Act. The disposal of that plea was a matter clearly within the competency of the Sheriff, and it was not said that in repelling it he had acted corruptly or maliciously. With reference to the second reason of appeal urged, it was not competent to appeal on the ground of insufficient evidence. The evidence was satisfactory to the Sheriff. If it was meant that the Sheriff had decided without any evidence whatever, he answered that the Sheriff had marked on the back of the summons the name of a witness who had been examined, and had also initialed in terms of the Act, several productions which had been made in support of the claim.

TRAYNER, for the appellant, replied that he was prepared to show *ex facie* of the proceedings, that the debt sued for was prescribed, and that if he could do so, the appeal was competent. An obvious error in point of law committed by the Sheriff was a good ground of appeal. It amounted to corruption, not in the ordinary but in the legal sense of that word. He referred to the case of *Bishop v. Chisholm*, 16th June, 1820, Fac. Coll. As to the evidence, he was instructed to say that none was led, and that was a proper subject for inquiry.

LORD ARDMILLAN.—I am quite clear that this appeal is incompetent. It is obvious that some evidence was led. That evidence may have been insufficient—I don't

say it was—but insufficiency of evidence is no ground of appeal. On the other point there is no difficulty. The plea of prescription was disposed of by the Sheriff. He may have done so erroneously—I don't say he did—but I cannot review his judgment upon it.

The appeal was accordingly dismissed as incompetent with expenses.

SOUTH CIRCUIT.

Sept. 26.
1862.

DUMFRIES.

Judges—LORDS COWAN AND NEAVES.

HER MAJESTY'S ADVOCATE—*Gifford A.D.*

AGAINST

WILLIAM M'EWAN OR PALMER.—*Scott.*

WICKEDLY AND FELONIOUSLY HAVING CARNAL CONNEXION WITH A WOMAN WHILE ASLEEP, WITHOUT HER CONSENT, AND BY A MAN NOT HER HUSBAND—SENTENCE.—A panel convicted on the above charge sentenced to ten years' penal servitude.

WILLIAM M'EWAN OR PALMER was indicted and accused—

THAT ALBEIT, by the laws of this and of every other well-governed realm, the wickedly and feloniously having Carnal Knowledge of a woman when asleep, and without her consent, by a man not her husband, is a crime of an heinous nature and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said William M'Ewan or Palmer are guilty of the said crime, actor, or art and part: IN SO FAR AS, on the 2d or 3d day of May 1862, or on one or other of the days of that month, or of April immediately preceding, or of June immediately following, in or near the hotel or house called or known as the Royal Hotel, in or near Kirkcudbright, in the parish and stewartry of Kirkcudbright, then and now or lately occupied by Robert Maxwell, innkeeper, then and now or lately residing there, you the said William M'Ewan or Palmer did, wickedly and feloniously, invade by stealth a bed in said hotel or house, in or upon which Sarah Barker or Maxwell, wife of, and now or lately residing with, the said Robert Maxwell,

No. 49.
William
M'Ewan or
Palmer.Dumfries.
Sept. 26.
1862.Feloniously
Having
Connexion
with a
Woman
while
Asleep,
&c.

No. 49. was then asleep, and did stealthily raise the petticoats of the said
 William Sarah Barker or Maxwell, and did unbutton or unloose your trousers
 M'Ewan or Palmer. and did lie down or place yourself above or beside her, and did intro-
 Dumfries. duce your private member into her private parts, and did have carnal
 Sept. 26. knowledge of her when asleep, and without her consent.
 1862.

Feloniously
 Having
 Connexion
 with a
 Woman
 while
 Asleep,
 &c.

The panel pleaded not guilty, and the case went to trial.

The jury unanimously found the prisoner guilty as libelled.

Sentence—penal servitude for ten years.¹

JAMES BENNET, Appellant—*G. Young—Cowan.*

AGAINST

JOHN JONES, Respondent—*E. S. Gordon—A. B. Shand.*

APPEAL—STATUTE 44TH GEO. III. c. 45, (Solway Fishing Act)—
 CONVICTION—In an appeal from a sentence of the Justices of the
 Peace in a prosecution under the Solway Act,—*Held* that the power
 of appeal given by the Statute allows a review on the merits.
 (2.) Circumstances in which the conviction of the Justices of the Peace
 for alleged contravention of the Solway Act was set aside on appeal.

No. 50.
 Bennet
 v. Jones.
 Dumfries.
 Sept. 27.
 1862.
 Appeal.

THIS appeal was taken to the Circuit Court against a
 conviction obtained in the Maxwelltown Justice of
 Peace Court, proceeding on a complaint at the instance
 of the Superintendent of Police for Dumfriesshire,
 founded on the 12th section of the Solway Act (44th
 Geo. III. c. 45).² The conviction bore that the ac-

¹ A report of the evidence in this case, by Hugh Cowan, Esq., Advocate, will be found in the *Edinburgh Medical Journal* for 1862, p. 570. See also the case of *Charles Sweeney*, High Court, Irvine, vol. iii., p. 109.

² Section 12th, 'If any person or persons shall beat the water, or hush, or lay any hot lime or filth, or steep any green lint or flax, or let off any stagnated water, or water mixed or impregnated with any hot lime or other pernicious thing, in or into the said arm of the sea, or any such river, rivulet, brook, stream, pond, pool, or other water as aforesaid, or shall therein or thereupon, or near thereto

cused had been guilty of a contravention of the Act—

No. 50.
Bennet
v. Jones.

IN SO FAR AS, upon 20th day of June last, the said James Bennet did, with a wooden pole, unlawfully beat the water in the river Nith, which runs into or otherwise communicates with the arm of the sea libelled, at or near that part thereof which runs or flows past or by the Mill-green, situated in the burgh of Maxwellton, in the parish of Troqueer, and stewartry of Kirkcudbright, by continuing to beat the water for a considerable time with said pole, as libelled; and therefore fine and amerciate him in the sum of five pounds sterling, of penalty, as for a first offence, and also in the sum of five pounds sterling, being the costs of suit or prosecution payable to the prosecutor; and failing immediate payment of said sums, sentences and adjudges him to be confined in the prison of Kirkcudbright, and there kept to hard labour for one calendar month, &c.

Dumfries.
Sept. 27.
1862
Appeal.

The following reasons of appeal were pleaded for the appellant :—

1. The respondent had failed to prove that the operations founded on as a breach of the Statute took place within the arm of the sea therein referred to, or in any of the several streams and waters which run into or communicate therewith.

2. Assuming that the operations libelled as having taken place on 30th June last, actually occurred (though the contrary was maintained), the respondent had failed to establish that the *locus* was the same as libelled, and within the jurisdiction of the Justices of said stewartry.

3. The decision was wholly against the evidence adduced, only two men at a distance of 60 yards in the

' set, lay or place any fire or light, or any white or other object, device, or thing, (except lawful fishing nets and engines,) which may be or tend to the injury or destruction of the fish, or of the brood-span or fry thereof, or which may prevent or tend to prevent fish from entering into the said rivers and waters, or any of them, or from going up or down the same, every such person or persons so offending, shall for the first offence forfeit and pay the sum of Five pounds, for the second offence the sum of Fifteen pound, and for the third and every other offence the sum of Twenty pounds'.

No. 50.
Bennet
v. Jones.
Dumfries.
Sept. 27.
1862.
Appeal.

grey of a summer morning, swearing to the appellant's beating the water as libelled, whilst six fishermen lawfully engaged in his immediate company, deponed to his not having done so; and these men more or less distinctly deponed to his having been at the time libelled engaged exclusively in the legal prosecution of his duty.

The counsel for the appellant having entered on the evidence led in the inferior court, it was objected by the respondent's counsel, that in appeals to the Circuit the merits of the conviction could not be looked into. *M'Lean v. Steele & Co.*, High Court, Nov. 24, 1856, Irvine, vol. ii. p. 553.¹

Answered for the Appellant:—

The inferior court was a court of record. It had been repeatedly settled in the Justiciary Court, that where there is no statutory provision to the contrary, the evidence must be taken down *ad longum*. Under the Act an appeal was given to the Quarter-Sessions in England, and it could not be supposed that such appeal was meant to be only on points of law.

LORD COWAN.—I think, under the power of appeal allowed by the Act, this Court is not excluded from considering whether the conviction was a just one or not upon the evidence. Had the Act excluded our taking any notice of the facts, the case would have been different. But so strongly does the rule apply that the

¹ Section 24th provides, *inter alia*, 'that all and every person and persons who shall think himself, herself, or themselves aggrieved by the judgment of any Justice or Justices of the Peace, or Sheriff or Stewart-depute or their substitutes, or other Magistrates aforesaid, within that part of Great Britain called Scotland, in any of the cases aforesaid, may appeal to the Lords Commissioners of Justiciary at their next Circuit Court, in the manner and by and under the rules, limitations, conditions, and restrictions contained in the Act of Parliament, passed in the twentieth year of King George the Second, for taking away and abolishing the heritable jurisdictions in that part of Great Britain called Scotland.'

jurisdiction of the High Court cannot be excluded, except where there is a special provision to the contrary, that there is a very remarkable case just now before that Court, under the Forbes-Mackenzie Act, which is very decided in its terms excluding review—the difficulty being that while it excludes review of all cases tried before the Justices or Sheriff, that provision does not apply to cases tried in the Bailie-court.

No. 50.
Bennet
v. Jones.

Dumfries.
Sept. 27.
1862.

Appeal.

LORD NEAVES.—I entirely agree with your Lordship. The evidence in this case has in point of fact been recorded. It has been done, and done regularly. In some instances, as under the Small Debt Act, there are limitations to the ground of appeal, so that it can only be taken where malice, oppression, or departure from form is alleged. But there is no such limitation here, and therefore it humbly appears to me that we are not only entitled, but bound to look into the grounds of the conviction in this case.

YOUNG and COWAN for the appellant. The term 'beating the water' was not a *nomen juris*, and the prosecutor was bound to allege the particular manner and effect of the procedure. If it were contended that it had an injurious effect on the fish, that ought to have been distinctly averred. On the contrary, the complaint did not even explain the nature of the alleged operations. The appellant's employer was tacksman of the fishings in the pool where the alleged offence was committed. The appellant had been engaged on the morning in question in fishing from a boat with a 'rake-net,' consisting of a pole with an iron hook at the end, to which a net was attached. The use of this instrument was lawful; it was found the most available mode of fishing in deep holes; and the use of it required the exercise of considerable force and dexterity. That was the operation which the two watchers employed for the discovery of contraventions of the Act, and to whom, as informers, half the penalties went, had, in the dusk of the morning, at the distance of 60

No. 50. yards, pronounced to be 'beating the water.' It was
 Bennet not a case of nicely balanced evidence, but a gross
 v. Jones. case ; and the sentence ought to be quashed.

Dumfries. GORDON and SHAND for the Respondent. The Act foun-
 Sept. 27. ded on was passed for the protection of the rights of the
 1862. river heritors, by preventing whatever tended to ob-
 Appeal. struct the free passage of the fish. The terms of the
 12th section, taken in connexion with the expression
 'beating the water,' clearly implied that that operation,
 which was intended to frighten the fish from ascending
 upward, for the benefit of those fishing below the caul
 of Dumfries, was one of the class aimed at by the Sta-
 tute. It was for the interest of the tacksman to pre-
 vent the fish from going over the caul, and to drive
 them into his nets at the pool, where the act libelled
 took place. There was no evidence that any salmon
 had ever been taken with the rake-net in that pool by
 the tacksman's fishers. It was in evidence, that on the
 morning in question they set out from the bank with a
 quantity of stones in the boat, and one of the appellant's
 witnesses had been convicted of throwing stones into the
 water on that very morning. If they had been *bona*
fide fishing with their net, it was not very likely they
 would have thought it advisable to disturb the fish at
 the same time, by flinging stones into the water. Both
 operations were practised for the same purpose, viz., the
 disturbance of the fish. As to the weight of testimony,
 the prosecutor could adduce no better evidence than
 that of the two authorized watchers, who were bound
 to be on the spot and observe what took place ; and
 the mere number of witnesses on the other side gave no
 additional credibility to their evidence. The Justice
 had rightly given more weight to their testimony than
 to that of persons who had an interest to deny the real
 state of the facts.

LORD NEAVES.—I see nothing in this charge that
 affects its relevancy ; but upon reading the evidence I
 think the case stands in a peculiar position. I recog-

nise to the full the principle contended for by the respondent, that the Court should not interfere in an ordinary case with the finding of the judge in the inferior court, who had seen the witnesses ; but the position of this case is somewhat peculiar. It was distinctly sworn by Mr. Payne that he prohibited his men from beating the water, and in that statement he was corroborated by some of the witnesses for the defence. Now, if that were a falsehood and an act of perjury, it was a very serious thing, for it was not a matter of mere mistake in observation. But Mr. Payne is a respectable person, having an interest to fish in this place, and having a right to do so. He might have a right to do so in a particular way or not ; and if his statement be true that he prohibited beating the water, and did not permit it to be done in his presence, it raises a certain presumption that in his presence none of his workmen would do a thing which he had prohibited when no benefit could accrue to them. The only one who could be benefited is Mr. Payne, and he avers and swears that he refused to be benefited in that particular manner. And thus we come to the fact that the defender is accused of having committed in his master's presence an illegality which his master swears he prohibits him from doing, and from which he could derive no benefit. That is a peculiarity in this case. And this runs into another question—Whether the parties who brought this prosecution—right or wrong—were not seeking to include in the notion of ‘beating the water,’ all the uses that were made of this particular net by poking it down and ‘churning’ with it,—which is not certainly quite beating the water where the stick is under the water. But it seems to be said that this use of the net was a means of disturbing the fish, a device, and an evasion of the law. If so, then let that particular offence be grappled with fairly, and let the prosecution be directed, not against the servant doing his master's work implicitly, but against the true delinquent who authorised

No. 50.
Bennet
v. Jones.

Dumfries.
Sept. 27.
1862.

Appeal.

No. 50. it. I therefore think the appeal should be sus-
Bennet tained.
v. Jones.

Dumfries. LORD COWAN.—I am entirely of the same opinion.
Sept. 27. The objection to the relevancy presented itself to me
1862. rather more strongly than your Lordship has stated it;
Appeal. because I apprehend that when the general charge of
'beating the water' was made, the kind of thing alleged
to constitute the offence ought to have been inserted in
the libel also. But I do not press that view, for this
reason, that as 'beating the water' might be shown on
the proof to be an illegal and guilty thing, and as no
objection had been taken before the Justice on that
point, it might be held that there was sufficient genera-
lity in the charge to permit the party prosecuting to
show that this was a guilty beating of the water. But
upon the evidence I am fully satisfied that on the
morning in question nothing else was done by Bennet
and his associates than what was done every morning
that the rake-net was used; and if so, I do not see why
this poor workman should suffer for doing his master's
work. It seems to me that there is no case against
Bennet, and that the appeal must be sustained.

The sentence of the court below was accordingly
quashed, with expenses to the amount of twelve guineas.

T. F. SMITH Writer.—T. & J. M'GOWAN, Writers.—Agents.

BENJAMIN WALKER, Appellant—*Cowan*.

AGAINST

JOHN JONES, Respondent—*A. B. Shand*.

APPEAL—PROSECUTOR—EXPENSES—In a prosecution before a Justice
of Peace Court, at the instance of the Procurator-Fiscal, for contra-
vention of the Solway Act, the complaint was dismissed, but ex-
penses were refused to the respondent. On appeal to the Circuit
Court, expenses were granted to the appellant, it being *held* that, as
any one of the public could prosecute under the Act, the fact of the
prosecutor being a public officer gave him no privilege.

THE appellant was tried before a Justice of Peace Court for a contravention of the Solway Act, but the prosecutor failed to establish his case, and the complaint was dismissed. Expenses were refused to the accused party, on the ground that the information was at the instance of a public officer.

No. 51.
Walker
v. Jones.

Dumfries.
Sept. 27.
1862.

Appeal.

Counsel for the appellant, in support of the claim for expenses, referred to a decision by Lords Ivory and Cowan at the Dumfries Circuit in April 1859, in which expenses were given to an appellant in a similar case, the Court having held that the fact of the informer being Procurator-fiscal afforded no privilege. Any one could prosecute under the Act, and he was in the same position as any other informer, and it was therefore within the power of the inferior court to grant expenses.

The Court sustained the appeal on the same ground, and awarded expenses, which were modified to six guineas.

J. M'M. CRITCHON, Writer—T. & J. M'GOWAN, Writers—Agents.

HIGH COURT.

Present,

Nov. 17.
1862.

THE LORD JUSTICE-CLERK,

HER MAJESTY'S ADVOCATE—*W. Ivory A.D.*

AGAINST

JOHN ANDERSON—*W. Christie.*

THEFT—HOUSEBREAKING—PROOF.—Circumstances in which an aggravation of Housebreaking was, under direction of the Presiding Judge, found not proven.

No. 52.
John
Anderson.

High Court.
Nov. 17.
1862.

Theft, &c.

JOHN ANDERSON was indicted and accused of the crime of Theft, especially when committed by means of House-breaking :—

IN SO FAR AS, on the 30th day of August 1862, or on one or other of the days of that month, or of July immediately preceding, or of September immediately following, you the said John Anderson did, wickedly and feloniously, break into and enter a cellar or other premises situated in or near Abercromby Place, Edinburgh, then and now or lately occupied by John Archibald Fullarton, bookseller, then and now or lately residing in or near Abercromby Place aforesaid, by forcibly removing or unfastening two staples or holdfasts which secured the door of said cellar or premises, or otherwise by forcing open the said door; and having thus, or in some other manner to the prosecutor unknown, obtained entrance into said cellar or premises, you the said John Anderson did, wickedly and feloniously, steal and theftuously away take an iron pulley, six or thereby brass cranks, two or thereby hammers, a tin flask, a paint brush, a leather tool case, a saw, a steel widener, three or thereby files, three or thereby screw-drivers, four or thereby chisels, five or thereby gimlets, a bag, one hundred or thereby screw-nails, one hundred or thereby holdfasts, and four and a half yards or thereby of canvas, the property or in the lawful possession of William Bryden and Son, bell-hangers in or near George Street, Edinburgh: And you the said John Anderson have been previously convicted of theft: And you the said John Anderson having been apprehended and taken before James Blackadder, Esquire, one of the magistrates of the city of Edinburgh, did, in his presence at Edinburgh, on the 4th day of September 1862, emit a declaration, which was subscribed by him in your presence, you having declared that you could not then write: Which Declaration; As also the stolen property above libelled, or part thereof; As also an extract or certified copy of a conviction of the crime of theft obtained against you the said John Anderson, under the name of Dugald Ferrier, before the Sheriff-Court of Edinburgh-shire, with a jury, at Edinburgh, on 8th November 1845; As also an extract or certified copy of a conviction of the crime of theft obtained against you the said John Anderson, under the name of Dugald Ferrier, before the High Court of Justiciary, at Edinburgh, on 17th March 1848; being to be used in evidence against you the said John Anderson at your trial, will, for that purpose, be in due time lodged in the hands of the Clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same.

The following evidence was then adduced—

WILLIAM PURVES, *Bellhanger with Bryden & Son*.—On the 30th August I was repairing a door at 6 Abercromby Place. William Morrison was working with me; we stopped work 5 minutes before 2. We put our tools in a cellar down the common stair; it is occupied by W. Fullarton, who lives in the common stair above. I afterwards showed the cellar to the witness Janet Shortreed. I secured the cellar door with two staples on outside, one at top and one at bottom. (Identifies tools.) On Monday morning at 6.30 we returned, and found the cellar door open, the holdfast at top was away. I cannot say if the one at the bottom was away or not. The tools were gone. The cellar door pulls to you.

No. 52.
John
Anderson.
High Court.
Nov. 17.
1862.
Theft, &c.

JANET SHORTREED, *Servant to Fullarton*.—He occupies two cellars at the foot of common stair. Purves and Thomson were working at the outer door. They came to me on Monday the 1st September; they afterwards showed me the cellar from which the tools were stolen. It was occupied by Fullarton.

PETER TAYLOR, *Broker*.—On the 30th April, between 1 and 2 p.m., panel sold me the articles libelled. I gave him 1s. 6d. He gave the name of John Smith, Lawnmarket. I am sure it was not later than 2 nor earlier than 1 p.m. he came to me.

WILLIAM MORRISON.—I was working with Purves in Abercromby Place on 30th August. We left at 5 minutes before 2 p.m. We put the tools in a cellar, and fastened the door with two staples, one at top and one at bottom. We left just in time to be at George Street at 2. On Monday morning we found door open and tools away.

The convictions were proved in the usual way.

The LORD JUSTICE-CLERK asked the counsel for the prosecution whether, on the evidence which had been given as to the state of the premises, he meant to insist in the aggravation of housebreaking.

IVORY.—The mode of entry adopted by the panel was not the usual one, and therefore infers housebreaking.

The LORD-JUSTICE-CLERK in his charge to the jury said—Housebreaking consists in violating the security of a dwelling or other house which is fairly locked up or otherwise secured to prevent entrance. If, therefore, a person enters by merely turning the handle of a door, this is the regular mode of entry, just as the owner himself would enter, and is not housebreaking; and if, as here, a cellar door is secured by a latch or a hook and eye, and a thief comes and undoes these, this will not

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constitute housebreaking. He may be guilty of theft if he takes anything, but you must discharge from your minds all consideration of the aggravation of house-breaking as against the panel.

Theft, &c. The Jury unanimously found the panel guilty of theft as libelled, but without the aggravation of house-breaking.

Sentence—six years' penal servitude.

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Present,

THE LORD JUSTICE-CLERK,

LORDS COWAN, DEAS, NEAVES, ARDMILLAN, AND JERVISWOODE.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Young—Moncrieff A.D.*

AGAINST

JAMES MILLER—*Scott—Morison.*

THREATENING LETTERS—INDICTMENT—RELEVANCY.—*Held*, that the term 'Threatening Letters' is not a *nomen juris*, and that an indictment which simply libelled the 'wickedly and feloniously writing and sending threatening letters,' was not relevant.

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Miller.
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Threatening Letters.

THIS case came before the Perth Circuit Court of Justiciary in September last. The panel, a writer in Dundee, was charged with having written and sent to a merchant there, and another in Glasgow, a variety of letters, containing threats of personal violence and public exposure, on account of alleged injuries. The major part of the proposition of the indictment set forth, that

ALBERT, &c., the wickedly and feloniously Writing and Sending, or Causing to be Written and Sent, to any of the lieges any Threatening Letter, is a crime of an heinous nature, and severely punishable: YET, &c.

An objection was taken by counsel for the panel, that the libel was not relevant, in respect the major proposition did not set forth any crime known in the law of

Scotland. The point appearing to the Court to be of general importance, the case was certified from the Circuit to the High Court

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MORISON, for the panel, argued—No instance could be shown of an indictment similar to the present having been sustained. The only case in which such a form had been used was that of *Gray v. Mackenzie*, High Court, Feb. 24, 1862, Irvine, vol. iv. p. 166, but in that case the point now raised was not decided. The statement in the libel amounted to this, that the sending of any threatening letter whatever was a crime. Evidently many letters might be written which could be characterized as threatening, and yet were not criminal. The illustration readily occurred of a man of business being employed by another to get money from a person, and to threaten him if he did not pay. That was in every sense a threatening letter, yet it could not be maintained that it involved any criminal liability. The usual addition of the words ‘particularly, &c.,’ in the major merely indicated that the thing so defined constituted a crime, the definition not being complete without them—*Alexander F. Crawford*, High Court, Jan. 6 and Feb. 11, 1850, J Shaw, p. 309. There was only one reported case in which the word ‘especially’ was used—*Charles Ross*, High Court, July 27, 1844, Broun, vol. ii. p. 271. The only two cases where a person was criminally liable for sending a threatening letter were when letters were sent for the purpose of revenge, or for extorting money, and when such was the case, it was necessary that the major proposition of the libel should set forth either the one or the other of these intents. Even then it was necessary that the threats should be such as would alarm a person of ordinary firmness; the mere threat was not in itself criminal—Hume, vol. i., p. 439; Alison’s Prin., 576. But here there was no specification of the nature or purport of the threats at all.

MONCRIEFF, for the prosecution, answered—The objection to the indictment proceeded on a misunderstand-

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ing of the meaning of the words 'threatening letters' in common English and in law language. To threaten was defined in Richardson's Dictionary as meaning 'to menace, to announce or denounce, to declare, to manifest evil, mischief, punishment, anything fearful or dreadful.' Hume describes the writing and sending of a threatening letter as a crime tending 'to deprive the person to whom it was addressed of that peace of mind and opinion of security which are among the chief benefits of the state of civil union.' The sending of threatening letters, therefore, according to that writer, though not a statutory offence, was a crime at common law, which guards the peace of any individual from being disturbed by any threats of evil, whether the threats be made for the sake of lucre or from mere malice. There was no case exactly of the same class as that with which the Court were now dealing, but the two that had been quoted were conclusive against the objection. The word 'particularly' in the one, and 'especially' in the other, implied that the thing so defined must be in itself a crime, for how could there be a particular instance of a *mode* of crime or of an *aggravation*, unless the thing to which these qualifications referred were a crime in itself? The word 'especially' was that commonly used in such indictments, to indicate an aggravation of what was in itself an offence. During the last 30 years, the word 'particularly' had been used in about three cases. In the following cases, the word 'especially' was used in the major, and in the minor the words 'aggravated as aforesaid'—*Douglas*, Dumfries Circuit, April, 1840 (unrep.); *Buchanan*, Glasgow Circuit, Sept. 1843, Broun, vol. ii., p. 271; *Sprot*, *ib.*, p. 179; *Muir*, Glasgow Circuit, Sept. 1844, (unrep.); and *Smith*, Arkley, p. 4. In none of these cases was any objection taken to the relevancy. There was, therefore, a consistent practice shown, followed without objection up to this time. That which is charged as a crime with an aggravation must be held to

be a crime without the aggravation. In the case of *Crawford* it was laid down by Lord Moncrieff that an illegal demand for a thing in itself legal is a crime. So in *Maclea*n, July 12, 1854, Irvine, vol. ii., p. 520. These authorities showed that the act of writing and sending a threatening letter was of itself a crime according to the common law, whatever might be the motive for sending such a letter.

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The SOLICITOR-GENERAL, for the prosecution, added—The letters founded on were such, that to write and send them constituted an offence by the law of Scotland. If the writing and sending of such letters constituted a crime, what was the name of it? They clearly came under that definition of the crime of writing and sending threatening letters given by Hume. They were letters the threats in which were of a serious and alarming character. They were not threats in any other or lower sense. The word threat was often loosely and popularly applied to anything that a party announced his intention to do; but these letters contained threats of mischief—of evil—threats which he was entitled to characterize as of a serious and alarming character; such as no person was entitled to write and send. Nobody was entitled to send letters to another man threatening to shoot him if he found an opportunity, or to horse-whip him, or to write libels against him and post these up in public places, and drop them in a public place. The objection made to the major of the indictment went deeply into the nature of the crime. He understood it to amount to this, that in the major the Crown must either specify the kind of threats which were used, or the purpose which the accused had in view in making them; but he did not understand that it was contended that a specification of both of these things was necessary in the major. In some cases the nature of the threats was specified in the major, and in others the purpose but not the nature of the threats. Now, what was the reason in principle for requiring the prosecutor

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in his major to attempt to characterize the nature of the threats which the letters contained? If they had a whole series of letters, as in this case, the nature of the threats in every one of them might be different. One letter might contain a threat against the person's life, another against his property, and another against his reputation. There was no end to the kind of threats which might be made, any one of which might be a crime; because any one of them would tend to deprive the man who was threatened of that peace of mind of which the law secured him the enjoyment. If it were necessary to specify in the major the nature of every threat, they might in some cases have a major as long as the generality of minors. There was no reason in principle for doing so, and none had been adduced except one, which was generally disregarded by the Court, namely, that if they used the general charge merely of sending threatening letters, it was possible to bring within the meaning of the general words something which might not be a crime. But a major in an indictment need not exclude everything which was not a crime, provided it included what was a crime, and the minor set forth undoubtedly what was indictable and was included in the major. There were many falsehoods and frauds not indictable, but the specification in the major of 'falsehood and fraud' covered many indictable frauds and falsehoods—(*Maitland*, Feb. 7, 1842, Broun, vol. i. p. 57, *per* Lord Mackenzie). The phrase 'sending a threatening letter' was a *nomen juris* in the sense in which it was meant here. There was a conclusive example in the case of *James Nelson*, Perth Circuit, (April 1840 unrep.), in which the major was the same in form as here, with the exception of the word 'maliciously' instead of 'feloniously,' but no objection was taken.

SCOTT, for the panel, replied—The words 'writing and sending threatening letters' were not *voces signatæ*, and meant nothing more in this indictment than in common language. The prosecutor was bound to libel

specifically the nature of the threat, the purpose or the result. There was nothing of the kind here ; but the thing had been put in the barest and most abstract form of 'sending any threatening letter' whatever. It was not disputed on the part of the Crown, that sending threatening letters included a vast variety of acts that were not criminal at all ; and it was stated by the Solicitor-General that the public prosecutor was not bound to exclude from the libel acts which were not criminal provided the libel did include acts which were criminal. No authorities had been referred to in support of the averment that the words ' sending threatening letters ' had acquired a technical meaning ; and the public had a right, therefore, to know from the Court what it was meant if they said that sending threatening letters was a crime. The criminality depended entirely on the nature and purpose of the threat, which ought therefore to be clearly and specifically described. If the Court sustained this indictment, the public were entitled to know what ' a threatening letter,' in the technical sense, was. The authorities, both in Scotland and England, showed that the phrase was used both in reference to criminal letters and to letters not criminal—Russell on Crimes, vol. ii. p. 406 ; Archbold's Pleading and Evidence, p. 746 ; *John Arthur*, High Court, March 16, 1836, Swinton, vol. i. p. 124 ; Alison's Pract., p. 232. It had been suggested by the Court that the words ' wickedly and feloniously ' might be held to supply the deficiency of specification ; but these words were not in themselves sufficient to characterise crime, and were, in point of fact, of very modern introduction as words of style—Hume, vol. ii. p. 239, *note*, and cases there cited. Prior to 1729, they had no existence in indictments, and unless the act charged was in itself criminal, these words had no effect in making it so. The word ' feloniously ' was used merely as equivalent to ' knowingly ' or ' wilfully.'—*Charles Sweeney*, High Court, June 18, 1858, Irvine, vol. iii. p. 109 ; *Elizabeth Kerr*, High Court, Nov.

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8 and 26, 1860, Irvine, vol. iii. p. 627. In the latter case these terms were held by the Lord Justice-General to be mere words of style.

The LORD JUSTICE-CLERK.—The Court having formed an opinion in this case, they have requested me to state the grounds of it. The major proposition charges the accused with the ‘ wickedly and feloniously writing and ‘ sending, or causing to be written or sent, to any of ‘ the lieges, any threatening letter.’ Now it is necessary to consider whether this major proposition, as regards its relevancy, obtains support from the use of the words ‘ wickedly and feloniously ;’ and it must be observed that, properly speaking, these words have no place in the major proposition. The proper place for these words in an indictment is in the minor proposition, and when they occur in the minor, they express a quality of the act which is there specifically charged ; they express that which is essential to the constitution of the crime—a certain condition of mind on the part of the accused at the time of committing the act libelled. I do not say that it is impossible, that these words should have any force or effect in a major proposition ; but whatever force or effect they may have, it cannot alter their settled meaning, which is what I have now endeavoured to explain.

Abstracting these words, the crime charged is, ‘ writing and sending a threatening letter.’ Now, that the use of threats is, in certain well-known cases, a crime in the eye of the law of Scotland, will not admit of dispute. A threat to burn a man’s house is undoubtedly criminal, and so is a threat to put him to death, or to do him any grievous bodily harm, or to do any serious injury to his property, his fortune, or his reputation. These are all criminal threats ; and any one who uses such threats may be punished for the use of them, although he had no intention of carrying them into effect, and no purpose to serve in using them, except it may be the gratification of his own malice or his own caprice. The very

using of the threat is in these cases itself a crime. But then, while there is a certain class of threats that are undoubtedly criminal in the eye of the law, there is another and a much larger class of threats that are not so ; and even threats that are immoral and unjust may not be of such a kind as to amount to a crime. It is therefore absolutely indispensable, when the criminal law deals with the use of threats as a ground of punishment, that care should be taken to distinguish between these two classes of threats. It seems to follow from this, as a necessary consequence, that the major proposition of a libel which charged the using and uttering of threats would not be relevant, assuming that that means the using and uttering of threats verbally, because there may be the using and uttering of threats in a great variety of cases which would not amount to a crime ; and the major proposition which I have supposed, therefore, would be a bad major proposition. On the other hand, it seems clear enough that the using and uttering of a threat verbally of such a kind as I have already adverted to—a threat to burn a man's house, or to take his life, or to do him some grievous harm—would be a relevant point of dittay, and a major proposition setting forth that would set forth a crime known in the law of Scotland.

But here we have the element of writing, and it is that which gives to this case its peculiar importance. The threats here are contained in letters, and the question comes to be, whether the crime of writing and sending threatening letters, or the writing and sending of a threatening letter, is a relevant statement of a crime in a major proposition. Here, again, it seems abundantly clear, that the writing and sending of a threatening letter, in the popular sense of these words, is not in every case criminal, any more than the use of verbal threats is always criminal. For it is only certain threats that are criminal ; and it is only if threats of that kind are conveyed in writing, that such writing becomes crimi-

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nal. It may be also that the threats so conveyed are used for an unlawful purpose, such as extorting money, and thus they may acquire in another way a criminal character. But if in the natural and popular sense these words, 'writing and sending a threatening letter,' do not in themselves amount to a statement of what is criminal, the only question remaining is, whether writing and sending threatening letters, or rather, properly speaking, the term 'threatening letters,' has a technical and fixed meaning in law, and signifies the writing and sending of letters containing threats of that particular kind of which the use is criminal? Now, we have considered the various authorities and the cases that have been cited to us, and upon the whole we have come to the conclusion that there has been no such fixed understanding or practice as to give any definite technical meaning to the term 'threatening letters,' and, consequently, that the major proposition of this indictment, which we read, for the reasons I have already stated, as simply libelling the writing and sending of a threatening letter, is not a relevant major proposition. The objection to the libel is therefore sustained.

The panel was then dismissed from the bar.

DONALD JAMIESON AND OTHERS, Suspenders—*Maclean*.

AGAINST

ADAM MACKAY, Respondent—*A. R. Clark*.

SUSPENSION—STATUTES 13TH AND 14TH VICT. C. 33, AND 19TH AND 20TH VICT. C. 103 (General Police Acts)—OPPRESSION.—Circumstances in which a conviction for Theft by a Burgh Magistrate, under the General Police Act, was *suspended*, on the ground that the proceedings were oppressive.

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Suspension.

THIS was a suspension of a sentence pronounced by one of the magistrates of Dumbarton in the following circumstances:—The suspenders were seven boys, sons of respectable parents in that town, the age of one of

them being sixteen, that of the rest varying from eight to thirteen. On Sunday, 13th July 1862, a theft of strawberries was alleged to have taken place from a garden in the neighbourhood of Dumbarton. One of the boys was apprehended near the premises on the charge of having been concerned in the theft, and the others were apprehended on the same charge, without a warrant, on the same evening, while in their homes. They were all lodged in the police-office; but, with the exception of one, were allowed to be bailed out by their friends on their giving security to the amount of £2 for each, that they would bring them back next morning. On Monday, at ten A.M., they assembled at the police-court—one of them attended by his mother, one by an elder brother, and the rest without friends. The statement of facts for them bore, that, on arriving at the Court, they were separated from their friends, and confined in a room under the charge of an officer, who repeatedly enjoined them to plead guilty, telling them that if they did so, they would get off easily. When the case was called, they were put at the bar, when a complaint was read, charging them all with the theft of six pints of strawberries. This was the first notice they had of the existence of such a formal complaint. They were not aware that the case was to be proceeded with that day. The complaint had not been served on them, and they had received no citation to be present to answer it. A citation, with warrant for their apprehension and to cite witnesses for both parties, was for form's sake filled up and signed by the magistrate, after they were in Court. On the complaint being read over to them, they all, with one exception, pleaded 'guilty.' Thereupon, the presiding magistrate found them guilty as libelled, and sentenced them to imprisonment for fifteen days; and, on the motion of the complainer, deserted the diet, *pro loco et tempore* against the one who had pleaded 'not guilty.'

On 19th July a bill of suspension and liberation was

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presented to Lord Neaves, which was granted, on the suspenders respectively finding caution that they should return to prison, and undergo the remainder of the period of imprisonment under the sentence complained of, in the event of the suspension being ultimately refused, under the penalty of £1 sterling.

MACLEAN.—for the suspenders, (1. The proceedings had been irregular, as not authorized by the General Police Act, under which the complaint was brought, in respect there was no proper citation to the complaint ; (2.) The whole procedure was oppressive, and operated substantial injustice to the suspenders. The rules referred to by the respondent were unknown to them. Several of them had no one in Court competent to look to their interests, and they were not allowed sufficient time for communication with their friends—*Donaldson v. Buchan*, High Court, November 18, 1861, Irvine, vol. iii. p. 109 ; *Graham v. Linton*, High Court, November 24, 1856, Irvine, vol. ii. p. 558 ; *Crawford v. Blair*, High Court, November 17, 1856, Irvine, vol. ii. p. 511 ; *Gray v. M'Gill*, High Court, February 27, 1858, Irvine, vol. iii. p. 29 ; *Robertson v. Mackay*, High Court, July 21, 1846, Arkley, p. 114 ; *Blyths v. M'Bain*, High Court, February 20, 1852, J. Shaw, p. 554 ; *Ritchie v. Pilmer*, High Court, December 20, 1848, J. Shaw, p. 142.

CLARK, for the respondent—The proceedings had been quite regular, under the 86th section of the General Police Act, and the rules framed under the Act for the burgh of Dumbarton. The whole procedure, particularly that in Court, had been perfectly formal. The Act and regulations were expressly framed for the purpose of summary apprehension and trial ; but they allowed delay on cause shown, if demanded by the accused, which had not been done in this case.

LORD COWAN.—This sentence is now sought to be suspended upon two grounds. The first of these is, that there was a departure from the legal procedure author-

ized by the General Police Act, under which the complaint proceeded, inasmuch as the accused were not duly cited to answer the complaint. I do not think that, apart from the peculiar circumstances of this case, the proceedings were in violation of the Act. In the case of a party of full age, it is quite competent to read the complaint to him when at the bar, and if he does not ask for time, to proceed with his trial at once. Therefore, so far as regards the alleged departure from regular procedure, I think there is no room for touching this conviction. But the peculiarity of this case is, that the accused were, with one exception, of very tender years, the age of the youngest being eight, and admittedly not more than nine. The very statement of the fact that a boy of such years is at once put on his trial in the above way, strikes one as bearing oppression on the face of it. The hurried and oppressive character of the proceedings is inconsistent, to my mind, with the due course of justice. I agree with the views expressed by Lord Ivory in the cases which have been quoted to us, that in circumstances like the present, where the parties are law-biding and not likely to abscond from injustice, time should be given them. They are not even informed at their trial that they may ask for time. There is no law-agent present to support their claims. They are instantly questioned. The complaint in such a case should have been served upon them, that their parents might have had an opportunity of seeing it, and advising with a professional person if so inclined ; and I cannot imagine anything more improper than to put a boy of eight years in the position of answering to such a complaint without advice. It was the duty of the magistrate to have intimated to them that they could have had delay. But no, they are instantly tried and instantly sentenced to fifteen days' imprisonment. For what ? Stealing a few strawberries ! The boys here are all in the same class, as respects age, with the exception of Macfarlane. Had he stood alone in this case, I would have had more

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 Jamieson satisfied that his case can be separated from the rest.
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LORD DEAS.—I am very much of the opinion expressed by Lord Cowan. There are here two grounds of suspension :—Incompetency and oppression. I agree that, in certain circumstances, there is no absolute incompetency in proceeding summarily as was here done. I think the Statute gives the power, with a view to certain exigencies, but not with a view to the power being exercised in all cases. It is a power to dispense with the usual deliberation and forms of procedure,—not a mode of procedure which is directed or prescribed to be followed. The ordinary course by service of a complaint is not done away with or superseded. That course, I think, is intended to be the ordinary course, still, although a more summary mode may be followed where the ends of justice require this to be done ; as, for instance, with vagrants and known thieves who have no proper locality, and would be off at once if not taken up and detained in custody. It is true that even these persons might be served with a complaint. But this would require to be done in jail, and the time thus given to them would require to be spent in jail ; so that the boon would not be favourable to the liberty of the subject. There may be reasons of expediency to warrant proceeding somewhat roughly in some cases, although not in all. If the dispensing power—for as such I regard it—is acted on without its being necessary to act on it, great care must be taken that there are no grounds for suspecting injustice in the result, otherwise the proceedings may be set aside on the ground of oppression. I think they fall to be set aside on that ground here. There was no necessity at all for the course which was followed, and there are strong grounds for doubting whether justice has been done. The case against the only boy who had his father present, and consequently pleaded not

guilty, was at once given up. This is a significant fact. The ages of the others, who were seven in number, varied from eight to thirteen, with one exception, which I shall immediately notice. The boy of eight is said to have had an elder brother present. How much older that brother was, is not stated. He does not seem to have taken any part in the proceedings. He was merely one of the audience ; and it is not said he had any more knowledge than the boy of eight of the forms of procedure or the right to ask delay. None of them were told that they might ask and obtain delay. The mother of one of the boys is said to have been there. She would not likely be a great lawyer any more than the married woman whose sentence was set aside in the case of Graham. The proper course would have been to have served complaints on the boys at their parents' houses, so that advice might be taken, and they might be properly defended. They were all law-abiding,—the sons of honest and known parents living in Dumbarton,—and there was no risk of them absconding. The fathers of some of them were working-men who had probably to be at their work that Monday morning when the seven boys were brought up, and all of them, in five minutes, convicted of theft by a sentence which would ever afterwards attach to and stand against them. I do not think that all this was compatible with reasonable security against injustice being done. The case is stronger against the sentence than some of those in the books, which were cases of grown-up persons. The only room for doubt is as to the boy of sixteen. But he was dealt with, not separately, but as one of a class. He was law-abiding like the rest ; and on the whole, I am not disposed to deal differently with his case from that of the others.

LORD ARDMILLAN.—I am of the same opinion. I have had considerable difficulty about the case of the boy of sixteen ; but on the grounds that have been stated with regard to his case, I agree that the suspen-

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sion should also apply to the sentence against him. It is no objection to this suspension that the boys pleaded guilty. The procedure in this case is such, I think, as the Court should look upon as not ordinary, but exceptional. It was competent, but only on the principle that exceptional proceedings are competent for an exceptional class of cases. It is not appropriate to the case where the parties against whom it is taken are law-biding, and not fleeing from justice ; and in such a case it involves an encroachment on the ordinary principles of our law, which surrounds the person of every subject with protection against injustice and oppression. All the circumstances of this case, that the accused were children of known parents residing in the neighbourhood, that the reading of the complaint in Court was the first they heard of it, that they were not properly assisted in their defence by parents or otherwise, combine to show that this was an arbitrary and exceptional proceeding. But it is said that the trial could have been postponed had they wished delay. Did these boys know their right to have done this ? The maxim, *ignorantia juris neminem excusat*, is true ; but I demur to its application to a child of eight years, and I have no hesitation in quashing the sentence.

LORD NEAVES.—I am extremely sorry to differ from all the Judges who have given their opinion, but I am unable to discover any legal ground on which this sentence should be set aside. Magistrates have power to order apprehension or citation. The adoption of either of these alternatives is in the discretion of the magistrate. I cannot discover any other principle on which he must proceed, and he must be left to the exercise of this discretion. It is the opinion of all your Lordships that the course taken here was competent. The magistrate had power either to cite or apprehend, and for us to attempt to say in which case he should do the one, and in which the other, is, I think, beyond our province. Even if the boys were improperly apprehended

on the Sunday, they were properly re-apprehended on the Monday, and tried in accordance with the rules of law and the regulations of the Court. The proceedings on Sunday were, I think, neither oppressive nor unjust. The parents and friends of the boys were in communication with them, and they were bailed out by them. The only relevant consideration that appears to me to favour this suspension is, that some of the boys were of tender years, and, with one exception, all under fourteen ; and I perfectly adopt the principle that, in such circumstances, their parents and guardians should have had knowledge of what was doing with regard to them. But it appears to me that they had so in this case. As regards the lad of sixteen, he was undoubtedly *sui juris*, and I cannot see any ground upon which the conviction against him can be set aside. At the same time, I do not much regret the result at which your Lordships have arrived ; because I do not think this conviction should ever have been sought, or such a sentence been pronounced.

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LORD JERVISWOODE.—I should be sorry to be supposed to entertain any approval of the sentence pronounced in this case ; but I can see no sufficient legal grounds for suspending it. Lord Neaves has so fully expressed the grounds of my opinion, that I content myself with intimating my agreement with the reasons he has given, and the result at which he has arrived.

LORD JUSTICE-CLERK.—A majority of your Lordships being in favour of suspending this sentence, I have no vote. I should withhold my opinion, therefore, if I thought the result affected no interest beyond that of the parties here. But I confess I have considerable apprehensions, as to the effect which your Lordships' judgment may have, which induce me to state the view that I take of this matter. It seems to me, that when it is conceded that the whole procedure under the complaint is perfectly competent and regular under the Statute, all that is left for the suspender is to make

No. 54.
Jamieson
and Others
v. Mackay.

High Court.
Nov. 24.
1862.

Suspension.

out a case of oppression in the use of this competent procedure. I cannot at all concur in the view suggested, that the summary form of process, made competent by the Act, and here adopted, is not intended to be applied to law-biding persons. I find no such distinction in the Act, and I rather apprehend that what is complained of in this case as great hardship would be held a still greater hardship if the persons were not law-biders. The great hurry and expedition, and the summary form of process, would, to my mind, involve greater hardship in the case of a vagrant or stranger. Observe what the proceeding is which the Act authorizes. The police-constable goes to apprehend these boys on Sunday evening, on a charge of theft committed that day. The 86th section of the Act justifies this, and I cannot understand why a resident in Dumbarton (which I take to be what is meant by a law-biding person) is not to be apprehended, under that clause, on reasonable suspicion of crime being entertained against him. Well, if the apprehension of the boys was competent, surely it was a proper and competent thing to admit them to bail. It is stated as a very prominent point in this suspension, that they had been apprehended on a charge of theft, so that they and their parents knew precisely what they were accused of. They were not secluded from assistance. They came up on Monday morning and pleaded guilty. All that was competent. The complaint was not incompetently made that morning, but it is said that because they were law-biding, the complaint should have been served. But why? Are they to get delay because they are law-abiders? Are they entitled to greater justice than vagrants or habit and repute thieves? There is no distinction made in the forms of trial of such parties, and a distinction could not be justified on good grounds. Thieves and vagrants could not escape from custody. Therefore there is no more reason for speed with regard to them than others. It seems to me, therefore, that the summary procedure

is intended for all persons at the discretion of the magistrate. The question remains, Were there any reasons, from the fact of these children being under age, why the trial should not have proceeded on that Monday, and adjournment should have been made? It seems to me that the only ground for such a contention in their favour would be, that they were not in the hands of their natural protectors or lawful guardians. But it is disclosed on the face of this suspension, that they were so from beginning to end, and there is no suggestion that at any time they were not so. I am sorry, therefore, I cannot concur with your Lordships in suspending this sentence. There appears to me no legal objection to it; and though I quite agree that this is a sentence which we could wish had never been pronounced, I cannot let that feeling lead me to the conclusion that there has been any oppression here, when, in point of fact, it is only too severe a punishment for a trivial offence.

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Jamieson
and Others
v. Mackay.
High Court.
Nov. 24.
1862.
Suspension.

The sentence was accordingly set aside with expenses.

JOHN LEISHMAN, W.S.—MURRAY and BEITH, W.S.—Agents.

GLASGOW WINTER CIRCUIT.

Dec. 23.
1862.

Judge—LORD COWAN.

HER MAJESTY'S ADVOCATE—*Thoms A.D.*

AGAINST

JAMES WILSON, GEORGE WARDROP, AND ISABELLA SMITH—*Cowan*
—*Balfour*.

EVIDENCE—STATUTE 15TH AND 16TH VICT. C. 27, SECT. 4—PROCEDURE.—*Held* incompetent to recall a witness who had been examined, for re-examination by the Crown, to answer a question in connection with a statement by a subsequent witness, in respect the subject-matter of the question was admitted by the Advocate-Depute to have been in his precognition.

No. 55.
James
Watson
& Others.

Glasgow.
Dec. 23.
1862.

Assault.

THE panels were charged with assault, to the effusion of blood and serious injury of the person, committed upon George Miller, puddler, at a bridge over the Cadzow burn, near Hamilton. They pleaded 'Not Guilty,' and the case went to trial. Bridget Queen, a witness for the prosecution, having deponed that she saw George Miller lying in the burn, and heard him call out, 'Oh! 'Johnny O'Brien, did you leave me?' the Advocate-Depute proposed to recall the said George Miller, under 15th and 16th Vict. c. 27, sect. 4, for the purpose of asking him whether he knew one of the prisoners by that name.

This was objected to on behalf of the prisoners.

LORD COWAN.—I do not think I can allow this. It ought to have been matter of examination when the witness was first called, unless the Advocate-Depute can say that the subject-matter of the question was not in the precognition of the witness, Queen, and that it had taken him by surprise.

The Advocate-Depute having admitted that the name spoken to had been in his precognition, and did not come upon him by surprise, the Court refused to allow the witness, Miller, to be recalled.

The jury returned a verdict of 'guilty,' with a recommendation to mercy on the ground of provocation, against the male prisoners, and of 'Not Proven,' by a majority, in the case of Isabella Smith. Sentence, eighteen months' imprisonment.

HIGH COURT.

Present,

Jan 5.
1863.

THE LORD JUSTICE-CLERK,

LORDS DEAS AND ARDMILLAN.

ALEXANDER MITCHELL, Suspendor—*J. C. Thomson.*

AGAINST

ROBERT CAMPBELL, Respondent—*A. R. Clark.*

SUSPENSION—LOCUS—NIGHT-POACHING ACT, 9TH GEO. IV. CAP. 69, SECT. 1.—INDICTMENT—RELEVANCY—AMENDMENT.—A Conviction under the Night-Poaching Act suspended, on the ground, (1.) That the complaint was irrelevant, in respect the description of the *locus* was unintelligible and insufficient, having been set forth as being in two separate parishes; (2.) That the offence charged of entering or being on land for the purpose of destroying ‘game or rabbits,’ was not a relevant charge under the Statute, and that, after the panel had pleaded to the libel as originally framed, the libel could not be amended by the deletion of the words ‘or rabbits,’ which would have been a relevant charge.

THIS was a suspension of a conviction by the Sheriff-substitute of Stirlingshire, pronounced in a prosecution under the 1st section of the Night-Poaching Act, 9th Geo. IV. c. 69, at the instance of the respondent as Procurator-fiscal.

No. 56.
Mitchell v.
Campbell.High Court.
Jan. 5.
1863.

Suspension.

The complaint set forth—

‘That’ the suspendor, ‘now or lately residing at Saltpans, in the parish of Dunipace and county of Stirling, and presently in custody, had been guilty of the crime or offence second set forth in the first part of the Statute before recited, actor or art and part, in so far as he did by night, that is to say, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, on the night of Saturday last, the 6th, or morning of yesterday, (Sunday), the 7th days of December 1862, unlawfully enter or be in a field or park commonly called or known as Wester South Park, forming part of the lands of Househill, in the parish of Dunipace aforesaid,

No. 86. ' the property of the trustees of the late Sir Gilbert Stirling of Mans-
 Mitchell v. ' field, and in the parish of Larbert and county of Stirling, with two
 Campbell. ' dogs and with a net which he had hung or affixed to a gate leading
 High Court. ' into the said field or park, for the purpose of taking or destroying
 Jan. 5. ' game or rabbits.'
 1863.
 Suspension.

When the case was called before the Sheriff-substitute (the prisoner having pleaded 'Not Guilty' on the previous day at a *pleading diet*), certain objections to the complaint were stated on his behalf. The Sheriff-substitute repelled the objections; and after trial, the suspender was found guilty and sentence was pronounced. The following is the minute of the procedure before the Sheriff-substitute :—

' At Stirling, the 9th day of December 1862 years—Compared
 ' Alexander Mitchell complained upon, who adhered to his former plea;
 ' and Hill, for the accused, objected to the relevancy of the complaint,
 ' on the ground, 1st, That the offence charged is not under the Sta-
 ' tute; 2d, That the offence under the Statute is the entering to take
 ' game unlawfully; here, game *or rabbits*; 3d, Entering to take rab-
 ' bits is not an offence under the Statute, and entering to take game
 ' unlawfully not charged.

' To which it was answered by the Procurator-fiscal, If I prove *game*
 ' under the Statute, I do not require to say anything or lead any proof
 ' further. The words 'or rabbits' are mere surplusage, and do no harm,
 ' but I will strike them out.

' The Sheriff-substitute allows the Procurator-fiscal to delete the
 ' words 'or rabbits' from the complaint; and that being done, repels
 ' the objections stated to the relevancy.'

Thereafter certain witnesses were examined upon oath in support of the complaint, and the following sentence was pronounced :—

' The Sheriff having considered the evidence adduced, finds the
 ' panel, Alexander Mitchell, guilty of entering or being in the park
 ' libelled, at the time libelled, with two dogs and a net, for the pur-
 ' pose of taking or destroying game, all as libelled; and therefore
 ' decerns and adjudges him to be imprisoned in the prison of Stirling
 ' for the space of two calendar months from and after this date, there
 ' to be kept to hard labour; Further, ordains the said Alexander
 ' Mitchell to find sufficient caution,' &c.

Mitchell having been imprisoned under the above sentence, brought the present suspension and liberation.

J. C. THOMSON, for the suspender, argued, (1.) The *locus delicti* was set forth in a confused, erroneous, and unintelligible manner, the field where the offence was stated to have been committed being described in the complaint as 'a field or park commonly called or known 'as Wester South Park, forming part of the lands of 'Househill, in the parish of Dunipace aforesaid, the property of the trustees of the late Sir Gilbert Stirling of 'Mansfield, and in the parish of Larbert and county of 'Stirling.' The field was thus stated to be wholly in two distinct parishes, which being impossible, the statement was to be taken as, in law, equivalent to the libelling of a place which has no real existence. (2.) The offence charged of entering or being in land for the purpose of destroying game or rabbits was not a relevant charge under the Statute; and it was incompetent for the Sheriff to allow the Procurator-fiscal to amend the complaint by deleting the words 'or rabbits.' The complaint being under the second part of the first section of the Act, the offence thereby constituted was not committed, and the penalty was not incurred by being in a field, &c., 'for the purpose of taking or destroying rabbits.' Accordingly, when this was charged, the statutory offence was not charged, and the libel was irrelevant. But a bad libel could not be converted into a good one by any change made after the panel had been placed at the bar; more particularly when, as in the present case, the alteration was made after the accused had pleaded to the charge as originally framed—*Smith v. Young*, High Court, March 18, 1856, Irvine, vol. ii. p. 402. The conviction had not a specific statement, or at least did not affirm the terms of the complaint with sufficient distinctness, in regard to the charge of 'being 'with a net.' The accused was charged in the complaint with having hung or affixed a net to a gate leading into the field libelled, but the conviction found it proved that he was 'with a net.' (4.) The sentence was not dated. The only date was the one at the outset of the minute

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of procedure, and applied to the interlocutor immediately following, and could not be held to apply to the sentence. Although not tied down to the form of conviction given in the Statute, the Sheriff was bound to follow it in all essential particulars ; and there the date was set forth with precision both at the beginning and the end. (5.) The conviction was bad, in respect the word 'unlawfully' had been omitted from the sentence pronounced by the Sheriff-substitute. There were three elements constituting the statutory offence here charged viz., (1.) unlawfully entering or being on lands by night ; (2.) being possessed of an instrument of the kind described ; and (3.) having the purpose of taking or destroying game. Any one or any two of these was insufficient to constitute the statutory offence without the third ; and although a prisoner were found guilty of the two last, yet unless he were found guilty of being unlawfully on the lands, *i.e.*, of trespassing, he was not liable in the statutory penalty. A proprietor could not be found guilty under this Statute, nor the game tenant, nor even a labourer who had the express permission of the proprietor to pass over his ground after nightfall, because such persons could not be unlawfully on the lands. The omission of the word 'unlawfully' from the sentence was the ground upon which the Court went in setting aside the conviction in the case of *Smith v. Young*.

The Court intimated an opinion that the third and fourth grounds of suspension could not be sustained, and directed the respondent's counsel to address himself to the others.

CLARK for the respondent, answered—there was set forth in the complaint a good and sufficient description of the *locus*, as the 'parish of Larbert' must be read as applying to 'Mansfield,' the place mentioned immediately before it. The place was clearly distinguished from all others, and that was sufficient. Further, this was an objection to the complaint which had not been

stated in the Court below, and could not now be pleaded. The objection to the complaint on the ground that the words 'or rabbits' were added to the charge, could not be sustained, as these words did not affect the former part of the charge which referred solely to game, and which could be competently proved independently of the words 'or rabbits.' Further, they were evidently inserted in the complaint merely *per incuriam*, and the Procurator-fiscal was entitled to delete them, seeing that they in no way affected the statutory offence which he undertook to prove. Neither was the omission of the word 'unlawfully' from the sentence a good ground of suspension. That word referred to the purpose for which the lands were entered, and, besides, it must be understood in the sentence in the present case, as it was undoubtedly implied in the words 'all as libelled.'

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The LORD JUSTICE-CLERK.—There are two objections to this conviction, which appear to me to be fatal. The first objection that the *locus* is not sufficiently described, appears to me to be well founded, and it is of no consequence that it was not stated in the court below. The description is inconsistent in its terms, and it is in fact impossible to read it. The second objection stated by the suspender is more formidable and substantial. The libel charged the accused with having entered upon a certain night the park called Wester South Park, for the purpose of taking or destroying game or *rabbits*. An objection was taken in the Court below to the libel, in respect that that was not a good charge under the first section of the Act. I think that objection well founded, and that the alternative charge there introduced of unlawfully entering the land during the night for destroying game or *rabbits*, was a bad alternative charge under the Act of Parliament. The first section of the Act, under which the suspender was convicted, consists of two branches—the second branch on which alone the libel is laid, being di-

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rected against persons who unlawfully enter, or be upon land at night with implements for the purpose of taking or destroying *game*, omitting the alternative words, 'or rabbits.' By striking out the words 'or rabbits' in the lower court, the complaint charged the accused with a good statutory offence, whereas, as it stood, it was not a good one. Such an alteration of the complaint I hold to be quite incompetent without the consent of the accused. There is nothing upon the face of the minutes of procedure to indicate that he acquiesced in the least degree in the objection he had taken to the first complaint, being obviated in an off-hand way. The accused had no opportunity of repeating his objection, for immediately on the interlocutor of relevancy being pronounced, the Procurator-fiscal was called on to lead his evidence. The accused was not asked to plead again to the amended libel, and he had no opportunity of renewing his objection in any other form. I therefore think that this second objection is a good one also. The last objection, on the ground that the word 'unlawfully' has been omitted from the sentence is not without difficulty; but it is not necessary to enter upon it in the present case, as upon the first two objections stated by the suspender, we have enough to quash this conviction.

LORD DEAS.—I concur. The first objection to the description of the *locus* is sufficient to set aside this conviction, as the libel cannot be read intelligibly. By no twisting of the words employed can the field be taken to be described as *partly* in each of the two parishes mentioned; and, if it be wholly in one of them, it is impossible to say in which of them. There is here a blundered description, which cannot be said to be an objection merely in point of form, but goes to the substance of the complaint. With reference to the second objection, the purpose of entering or being in the lands must by statute be the taking or destroying of *game*; but the suspender was charged here with being in the field libelled in pursuit of game or *rabbits*. The deletion

of these two last words by the fiscal was not of the nature of a partial restriction, or mere correction of the libel, for if the libel had stood as it was, no crime was charged. The suspender was entitled to assume that, if he could show that the pursuit of rabbits was not within the Statute, there was an end of the charge, and that he need not come prepared to defend himself against a different libel. There was no consent on his part,—express or implied,—so far as I can see, to this alteration. That might have presented to us a very different case. For, in place of a benefit, it is very often a great hardship to a prisoner, who is prepared with his defence on the merits, that his trial cannot proceed till a new libel shall be served ; and I should be slow to lay it down that there may not be a waiver of such an objection as occurred here where the ends of justice are not interfered with. Neither do I say anything of minor corrections, even without consent, which neither change the libel nor put the prisoner to any possible disadvantage, and which can only be judged of by their own circumstances. According to the view I have taken, it is unnecessary to dispose of the further objections pleaded for the suspender.

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LORD ARDMILLAN.—I am of the same opinion. I should have had some reluctance in setting aside this conviction on the first ground, which evidently arose from an oversight on the part of the respondent ; but I think that in the second objection we have a good and substantial ground of suspension. As this complaint at first stood, there was not a good and relevant offence charged under the Statute, and there is not on the face of the procedure any necessary implication of consent to the alteration of the libel on the part of the accused.

The following interlocutor was pronounced :—‘ Find that the complaint was irrelevant, in respect the description of the *locus* is unintelligible and insufficient, and in respect the offence charged of entering, or being in land for the purpose of destroying game or rabbits,

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 1863.
 Suspension.

' was not a relevant charge under the Statute, and that
 ' the libel could not be amended by the deletion of the
 ' words 'or rabbits,' and the trial then proceeded with,
 ' without the consent of the accused: Therefore pass
 ' the bill, suspend the sentence complained of *simpliciter*,
 ' ordain the suspender to be forthwith set at liberty, and
 ' decern: Find the suspender entitled to expenses, &c.

CHARLES RITCHIE, S.S.C.—MORTON, WHITEHEAD, and GREIG, W.S.—Agents

CHARLES TRAINER, Suspender—*Gifford—W. A. Brown.*

AGAINST

DAVID JOHNSTON, Respondent—*Lord-Advocate Moncreiff—Fraser.*

SUSPENSION—STATUTES 2D AND 3D WILL. IV. c. 68 (Day-Trespass Act), AND 25TH AND 26TH VICT. c. 114 (Poaching Act)—OATH.—
 In a prosecution under the 2d section of the Act 25th and 26th Vict., which refers to section 11 of the previous Act, 2d and 3d Will. IV. c. 68, it is necessary to *charge the offence*, and without such charge made *de presenti* by the constable apprehending, in the statutory deposition upon oath, the Justice cannot competently issue a warrant of citation. Conviction on a complaint proceeding on a deposition where this had not been attended to—suspended.

No. 57. *Trainer v. Johnston.*
 High Court.
 Jan. 5.
 1863.
 Suspension.

THIS was a suspension of a conviction obtained before a Justice of Peace Court in the Stewartry of Kirkcudbright, on a complaint under the Poaching Act, 25th and 26th Vict. cap. 114, sect. 2, which provides that any constable or police-officer having good cause to suspect any person of coming from lands where he has been unlawfully in pursuit of game, may search him, and finding such game, is to apply to the Justices for a warrant citing such person to appear before the Justices to answer to the charge, and the Justices, if the charge shall be established, shall inflict a penalty of £5, and order the nets and other implements to be destroyed or sold.

On 6th November, 1862, the suspender and another person of the name of Grant, while proceeding on the road from Kirkcudbright to Mutchill, were searched on the highway by two policemen, who found upon them certain game and implements for seizing game. The policeman, on 13th November following, proceeded before one of the Justices for the Stewartry of Kirkcudbright, and made oath 'that having good cause to suspect' the suspender and Grant 'on the 6th of November, of coming' from certain specified lands where they had been unlawfully in search or pursuit of game, and having in possession of each of them game unlawfully obtained, they searched them on the highway above mentioned, and found certain game and implements for obtaining game in their possession. In respect of these oaths, a Petition and Complaint at the instance of the respondent, the Procurator-fiscal of the Court, was presented against the suspender and Grant, who, after trial, were found guilty by the Justices, and sentenced to pay a fine of £5, with £5, 0s. 8d. of expenses, for which they were found jointly and severally liable.

No. 87.
Trainer v.
Johnston.
High Court.
Jan. 5.
1863.
Suspension.

GIFFORD and W. A. BROWN, for the suspender, argued—That the conviction should be set aside, because (1.) the proceedings were at the instance of the Procurator-fiscal, whereas, by the Act founded on, the title to prosecute was conferred upon the constable apprehending. It was true that the Act 2d and 3d Will. IV. c. 68, which gave the Fiscal right to sue in such matters, was made applicable to the present Statute, but it was only so in regard to the recovery and enforcement of penalties. In the event of it being held that the proceedings were rightly brought by the Procurator-fiscal, it was maintained that they were defective, in respect the oath of the constables did not charge the offence, as required by section 11 of the Act, the oath actually made amounting only to a statement of suspicion; and that certain things were found. (2.) While various objections were stated to the relevancy and competency of the proceed-

No. 57.
Trainer v.
Johnston.
High Court.
Jan. 5.
1868.
Suspension.

ings before the Justices, they had failed to authenticate according to law, by the signature of two Justices, the interlocutor repelling these objections. (3.) No record had been made by the Justices of the evidence adduced at the trial, whereas, although review on the merits was excluded in the High Court, there was still a right of appeal to the Quarter Sessions, which contemplated a review of the merits. (4.) In the clause of the recent Act founded on, there was nothing said about expenses, in addition to the penalty imposed as a fine, and in the absence of any such provision it was *ultra vires* of the Justices to award expenses. (5.) At any rate, it was *ultra vires* of the Justices to award expenses, as had been done in the present case, jointly and severally.

Counsel for the respondent having been directed by the Court to speak with reference to the pleas in regard to the insufficiency of the oath, and to the award of expenses jointly and severally—

The LORD ADVOCATE and FRASER argued—That no oath was necessary to be emitted on the part of the constable at all. All that he was required to do was to apply to the Justices for a summons citing the party searched to appear before them. That was regulated by section 2 of the Act 25th and 26th Vict., and the section of the Act 2d and 3d Will. IV., providing that the offence should be charged by a party upon oath, was not necessarily made applicable to the recent Act. At any rate, the oath was in itself perfectly sufficient. It distinctly averred that having good cause to suspect the parties of having been unlawfully in pursuit of game upon certain lands, they searched them, and found certain game, as there specified, in their possession. It was mere sophistry to say that that was not substantially a charge of the offence; but whether a charge of the offence or not, it was all that was necessary under section 11 of the Statute. In regard to the last plea, it was maintained that the act libelled was a joint act, and that it was just as competent in a criminal prose-

cution to award expenses jointly and severally as it was in a civil suit, where joint defenders could notoriously be so made liable.

No. 57.
Trainer v.
Johnston.

High Court
Jan. 5.
1862.

Suspension

The LORD JUSTICE-CLERK.—I think the objection to the insufficiency of the oath well founded, and therefore it is not necessary to dispose of the other objections which have been urged by the suspender's counsel. In regard to the manner in which offences shall be prosecuted under the recent Act, the previous Act of Parliament, 2d and 3d Will. IV. c. 68, is made applicable, particularly in respect of the clause providing that the offence shall be charged on the oath of a credible witness. I cannot read the oath emitted in the present case as an oath of credulity. It was emitted a week after the apprehension and search by the constable, and does not import that when emitted the constable *then believed* the parties to have been unlawfully in pursuit and possession of game, and thus does not amount to a charge of the offence, as is required by section 11 of the Statute. Without such an oath charging the offence, the Justices would not be justified in issuing a warrant of citation.

LORD DEAS.—I am entirely of the same opinion. I think that section 11 of the Act 2d and 3d Will. IV. c. 68, providing that the charge shall be made by the oath of a credible witness, is imported into the recent Act, and it will not do for the respondent to adopt (as he finds it necessary to do) this mode of construction as to one part of the enactment and repudiate it as to another. The mistake made in the terms of the oath was a natural one ; but still it was a mistake. In regard to the plea as to joint liability in the expenses of a criminal prosecution, I would recommend public prosecutors to act upon the safer view suggested by Mr. Barclay in his 'Digest,' although I give no opinion upon the point itself.

LORD ARDMILLAN concurred.

The Court accordingly suspended the conviction ; but

No. 57. in respect the objection as to the insufficiency of the
 Trainer v. oath in which the proceedings originated had been taken
 Johnston. for the first time at the debate in the High Court, al-
 High Court. lowed expenses to neither party.
 Jan. 5.
 1863.

Suspension.

W. S. SMART, S.S.C.—HUNTER, BLAIR, & COWAN, W.S.—Agents.

DAVID ROBERTSON, Suspender—*Scott*,

AGAINST

The Right Hon. MARGARET BARONESS KEITH and Others, Respon-
 dents—*J. G. Smith*.

SUSPENSION—CONVICTION—PROOF IN REPLICATION—PROCEDURE.—

In a prosecution before a Justice of Peace Court for breach of the Day-Trespass Act (2d and 3d Will. IV. c. 68), after the proof on both sides had been closed, the presiding Justice made avizandum with the cause, and appointed a day for pronouncing judgment. On that day the agent for the prosecution moved for leave to lead proof in replication, on the ground that he had received no notice of the accused's defence of *alibi*. The motion was granted, and after the proof had been taken in replication, the Justice found the complaint proven, and convicted the accused.—*Held* that, looking to the time at which the proof in replication was granted, the proceeding was *incompetent*.—The conviction set aside accordingly.

No. 58. THIS was a suspension of a conviction obtained before
 Robertson a Justice of Peace at Coupar-Angus, on a complaint
 v. Baroness & Keith. under the Day-Trespass Act. The accused had pleaded
 High Court. 'Not Guilty.' Two witnesses were examined for the
 Jan. 5. prosecution, who deponed, that between 10 and 12
 1863. o'clock of 15th January 1862, he had been found on
 Suspension. the lands of Meikleour at a rabbit-hole with the imple-
 ments of poaching in his possession ; and on this the
 'agent of the suspender declared his proof closed,' and
 signed an entry in the proceedings to that effect. Wit-
 nesses were examined for the defence to prove an *alibi*.
 One said that he had gone with the prisoner, on 15th
 January, to Forfar by the train which left Rosemount

Station at 8.30 A.M. ; and after spending the day in Forfar, had come home by the train, leaving Forfar at 4.30. P.M. Another said he had been drinking with the prisoner on the 15th in Forfar, and saw him off by the train at half-past four. Lastly, his mother swore that she had met him on the arrival of the train at Rosemount. The record then bore—‘The procurator for the accused declared his case closed ;’ and this entry followed :—

No. 58.
Robertson
v. Baroness
Keith.
High Court.
Jan. 5.
1863.
Suspension.

‘*Coupar-Angus*, 17th February 1862.

‘The Justice makes avizandum with the complaint and proof, and appoints this day week at 11 o’clock, within the same place for pronouncing judgment.

(Signed) ‘M. MURRAY, J.P.’

On 21st February the agent for the prosecutor sent the accused and his agent written intimation that, at the meeting of the Court on the 24th, he would move for proof in replication. The agent for the accused answered that the case was concluded, and he would not attend. On 24th February, when the Court met to give judgment, the prosecutor moved as he had intimated, on the ground that he had received no notice that an *alibi* was to be proved, and that he had been taken by surprise. The justice granted the motion, and appointed the proof in replication to take place on 3d March. The procedure now mentioned took place in absence of the accused and of his agent, and no notice of the diet of proof was sent.

On 3d March certain witnesses were examined, who deponed that there were no passengers from Rosemount Station, on 15th January, by the morning train, or any other train, till late in the afternoon ; and that there were none from Forfar either for *Coupar-Angus* or Rosemount by the train which left at 4.30.

The Justice then found the complaint proven, fined the prisoner in £2 and expenses ; and failing payment, sentenced him to sixty days’ imprisonment.

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The prisoner having been put in jail, presented a bill of suspension and liberation on the following grounds :—
(1.) The proof for both parties having been led and concluded, and their agents having been heard thereon, and no further proof having been asked, and the case taken to *avizandum*, and a day appointed for pronouncing judgment, it was illegal and incompetent to allow the respondents a further proof. (2.) In the circumstances, it was incompetent and irregular for the respondents to apply for, and for the Justice to grant a proof in replication. (3.) It was incompetent and irregular for the respondents to lead proof without giving the complainer notice thereof, and the Justice was not entitled to take the said proof into consideration. (4.) The pretended judgment and order of commitment having been pronounced upon the evidence, including the said incompetent proof, they are null and void. (5.) The whole proceedings subsequent to allowing the proof in replication being irregular, illegal, and unwarrantable, they should be suspended, and the complainer liberated as craved.'

J. G. SMITH, for the respondent—The procedure was in the circumstances perfectly competent and proper. It had not resulted in any injustice to the appellant; on the contrary, the sole grievance was, that a conspiracy to defeat the ends of justice had been detected and defeated. When the prosecutor closed his 'proof,' he did not close his case, but his proof in chief, and having had no notice of the *alibi* he was entitled to a proof in replication; otherwise by simply pleading 'Not Guilty,' the accused could always prevent an *alibi* from being answered. If proof in replication was competent the only further question was, Whether the motion had been too late? The Statute provides, that the party is to be 'summarily convicted' on legal evidence (sect 1.) The Act of 1828, introducing the summary form of trial in criminal cases in the Sheriff-Court (9th Geo. IV. c. 29, sect. 19), provided that the proof was 'to be taken

'in the easiest and most expeditious manner.' The Day-Trespass Act (sect. 15) did not require the strict observance of forms ; and if the prosecutor was at liberty to take the proof in the easiest and most expeditious manner, surely the Justice was entitled, even at the very last stage of the case, in the exercise of the general control which every judge had of the proceedings before him, to take such a course as would prevent the Court being imposed on. In civil cases a judge had undoubtedly this power. Evidence had been permitted to be led, to save a formal objection after both sides had fully laid their case before the jury—(*Christie v. Thomson*, 21 D. 337). This case was still a depending cause up to the date of adjournment. No doubt *avizandum* was said to have been made, but that was an inaccurate expression, for *avizandum* could never be made of a criminal case ; it could only be continued to a certain day, when the accused might know to be present. The Justice might then have returned and said, he had so many doubts he could not make up his mind, and required further evidence on certain points. Practically, nothing further was done here ; and in the whole circumstances this conviction ought not to be interfered with.

The LORD JUSTICE-CLERK.—I am not prepared to give any opinion as to whether proof in replication is competent in a proper criminal trial, because, whether competent or not, I am satisfied that in this case it was not asked in proper time. The case on both sides was closed ; parties were heard ; the Justice proceeded to make up his mind ; and then for the first time the prosecutor proposed to lead a proof in replication. Whether, by granting that proof in replication, any substantial injustice was done to the accused, I do not inquire. But I am perfectly clear that, looking to the time at which this demand was made, the proceeding was ut-

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terly incompetent, and the conviction which proceeds upon it must be quashed.

LORD DEAS.—I do not say whether notice of *alibi* was or was not necessary under this Statute, in the same way as it is in the practice of this Court. But, at least, the plea should be disclosed before the prosecutor closes his case, so that he may crave an adjournment if he is taken by surprise. The only other course consistent with the ends of justice, would be to allow a proof in replication. It is not necessary here to determine the general rule ; because I am clearly of opinion that when both parties had closed their case without objection,—debated it as a concluded case,—taken the chance of a judgment in their favour,—and the Judge had made *avizandum*,—it would be setting aside all rules and forms of procedure, after an interval of time, to allow further evidence to be led.

LORD ARDMILLAN.—I am of the same opinion. I do not think it necessary or advisable to indicate an opinion as to the competency of a proof in replication. I shall only say that where notice of *alibi* is not given, it would require great strictness of rule to prevent the prosecutor from going into a proof in replication. It is quite different from evidence in replication, where notice of the defence has been given. The mistake here committed by the prosecutor was not in closing his proof without meeting a defence of which no notice had been given, but in craving judgment on his proof, and then asking for further proof when it was too late.

Conviction set aside, with expenses.

JOHN GELLATLY, S.S.C.—J. & J. GARDINER, S.S.C.—Agents.

Present,

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THE LORD JUSTICE-GENERAL,

THE LORD JUSTICE-CLERK,

LORDS COWAN, DEAS, ARDMILLAN, NEAVES, AND JERVISWOODE,

REV. PATRICK M'LAUGHLIN, Suspender.—*A. R. Clark—A. B. Shand.*

AGAINST

R. DUNCAN DOUGLAS and WILLIAM KIDSTON, Respondents.—
Sol.-Gen. Young—Lee.

WITNESS—EVIDENCE—CONFIDENTIALITY—CONFESSION TO CLERGYMAN—OATH—CONTEMPT OF COURT—A Roman Catholic Clergyman was sentenced by a Justice of Peace Court to be imprisoned for thirty days for contempt of Court, in so far as he had refused to answer a particular question put to him in the course of examination as a witness, on the ground, that answering it would lead to a violation of his duty by his disclosing information given to him as a clergyman by a penitent.—*Held*, in a suspension, that the witness was bound to answer the question, because whether communications made by penitents to clergymen were privileged or not—a point which the Court abstained from deciding—the question put to the suspender did not relate to any such communication, but referred merely to matters of fact within his knowledge.

Observed, that the Justices, who, on the witness objecting to take an oath to tell the whole truth, had administered an oath 'to tell the truth, and that whatever he said should be truth,' were wrong in administering any oath except the ordinary one; but that, nevertheless, the witness, who thought the terms of the oath were such as to liberate him from answering a particular question, was bound to answer it, on the ground that the obligation of a witness to give evidence was not dependent on the terms of the oath administered.

THIS Bill of Suspension and Liberation was presented by the Rev. Patrick M'Laughlin, Roman Catholic clergyman at Eastmuir of Shettleston, in the Barony parish of Glasgow, who was imprisoned by order of a Justice of Peace for contempt of Court, on the ground that, when examined as a witness at the trial of Terence

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M'Ghee, accused of theft, he refused to answer a particular question put by the Procurator-fiscal. The trial of M'Ghee arose out of the following circumstances :—

Terence Ferguson, labourer at Tollcross, near Glasgow, had enclosed two half-sovereigns in a letter addressed to his father, who resided in Ireland, and gave the letter to M'Ghee to be posted. The letter reached Ferguson's father, but without the two half-sovereigns. After inquiries had been made at the Post-office, Ferguson received through the post an envelope enclosing a pound-note, with the written explanation—' This is the ' pound-note you sent to your father, which went ' amissing.' The police discovered that these words had been written by the suspender, and he was accordingly adduced and examined on oath as a witness at the trial of M'Ghee for theft of the two half-sovereigns, on 11th December 1862, before the Justices of Peace.

The warrant for the suspender's incarceration bore, that he having been examined on oath before the respondent, Mr. Kidston, a Justice of Peace, as a witness, was shown an envelope bearing the post-mark of the Post-office at Glasgow, November 23, 1862, addressed to Mr. Terence Ferguson, care of Mr. Terence M'Ghee, Tollcross, Glasgow, and was also shown a piece of paper with the following words written thereon : ' This is ' the pound-note you sent to your father, which went amissing,'—he deponed that the said address on the said envelope, and the said writing on the said piece of paper, are in his handwriting, and that there was a one-pound note enclosed in the said envelope along with the said piece of paper ; that he sealed the envelope containing the said piece of paper and the said one-pound note, but that he did not himself put the said envelope and its contents into the Post-office. And he being desired to say whether he delivered that sealed envelope and its said enclosures to Terence M'Ghee, the accused, to be posted, he, the said Patrick M'Laughlin refused to answer the said question, and I (the presiding Justice of Peace, Mr. Kidston) having informed him that he is bound to answer that question, and explained the consequences of his continuing to refuse to answer it, and I having put the said question, and required him to answer it, and to state whether the said Terence M'Ghee, the accused, is the person to whom he delivered the said envelope, and its said contents, to be posted, he, the said Patrick M'Laughlin, refused to answer, and persisted in his refusal to answer

the said question. Therefore, in open Court, and in a summary manner, I, for the said contempt, adjudge the said Patrick M'Laughlin to be committed to the gaol of Glasgow, therein to be detained for thirty days.

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In the reasons of suspension the suspender stated, that when called as a witness, he, before any examination was commenced, explained that he had conscientious objections to take the oath in the form usually administered, and as proposed to be administered to him. He fully and anxiously explained to the presiding Justice, in open Court, the grounds upon which he rested his objections, being in substance, that, according to his conscience, if he were, in the matter before the Court, to take an oath which would bind him to answer every question which the prosecutor might choose to put to him, this might, and probably would, involve a violation of his duties as a clergyman and a priest, called upon to receive confidential communications from a penitent. He at the same time stated—' I am willing ' to swear that anything I say shall be truth to the best ' of my knowledge.' That, after objection by the prosecutor, the presiding Justice agreed to administer an oath which the complainer could conscientiously take. Accordingly an oath in the following terms was tendered and taken, viz. :—' I swear by God I shall tell ' the truth, and nothing but the truth, and whatever ' I shall say in this case shall be truth.' No further or other oath was thereafter either tendered or taken by the complainer. Thereupon the examination of the suspender as a witness was proceeded with, and, in answer to the prosecutor, he stated, that he had addressed the envelope containing the one-pound note, and had written the accompanying explanation, and that he had enclosed the note and sealed the envelope. Being then interrogated, ' To whom did you deliver it ? ' The complainer declined to answer that question. It would have involved a violation of the complainer's duty as a clergyman, and he must have revealed a confidential

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communication from a penitent had he answered the question put to him. The oath he had taken did not require him to answer that question, and he was required to take no other oath. He adhered to his declination to answer the question. After considerable discussion, the Court adjourned till Thursday the 11th December, in order that the complainer might reconsider the position in which he was placed.

On Thursday the 11th December, the case being again called, the question was put—'Whether he had given the letter containing the one-pound note to the accused party, Terence M'Ghee, for the purpose of being posted?' Which question the complainer declined to answer for the reasons formerly explained and again repeated.

It was further stated, that when the Judge stated his intention to commit the suspender for contempt of Court, an offer was made on the part of the prisoner to plead guilty, but the Court declined to receive the plea, and sentenced the suspender to thirty days' imprisonment. He was liberated on the 25th, under an interim warrant of liberation granted on the present bill.

The suspender pleaded that, (1.) The proceedings were irregular, in consequence of the departure by the presiding Justice from the recognised form and substance of oath usually administered in the Courts of Scotland. (2.) The qualified oath above mentioned having been accepted by the Court, after the explanations given, the complainer could not be held as guilty of a contempt, by declining to answer the question referred to. (3.) The suspender was illegally committed to prison for contempt, in respect that, in his testimony, he complied with all that he undertook in the oath taken by him, and that he was not required to take any other or further oath. (4.) It was irregular and incompetent for the Justice to issue the sentence and warrant complained of, in the face of the offered plea of guilty by the accused party, which plea would have rendered any procedure

against the complainer as a witness unnecessary. (5.) The information possessed by the suspender in regard to the subject of inquiry before the Justice having been obtained by him as a confession from a penitent to a clergyman, and having been received on the footing that it should not be disclosed by him, he was not bound to answer the question put to him.

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CLARK and SHAND, for the suspender, argued—The circumstances under which he had refused to answer were these : A person had waited on him as his spiritual adviser, and admitted the abstraction of the money ; he had advised him to restore it, and having got the money, had enclosed it in the envelope to Ferguson. It was clear that, in these circumstances, an answer to the question put by the Fiscal would have disclosed, or had a tendency to disclose, who the person was who had confessed to the abstraction of the money, and so to disclose that confession. It was not averred that this communication had been made by a penitent in the Confessional, nor was any argument rested on the fact that the suspender was a Roman Catholic priest. It was not wished to represent that the suspender was in any other position than that simply of a clergyman, who was asked to disclose private communications made to him by one who came to ask his advice as a clergyman.

It was not necessary to consider the general question, whether such communications were privileged. The fact that the suspender had publicly stated his objection to disclose the whole truth, and that the Justice had agreed that he should take an oath which did not oblige him to tell the whole truth, made the case a special one. The Judge was wrong in administering an oath which was not the usual one—*Queen v. Hay*, 1860, Foster and Finlason, ii. 4. The question, however, was, whether, in refusing to answer the question, the suspender was guilty of contempt of court ? Now he was not, because the Judge had plainly sanctioned his refusal to tell the whole truth. It was true that the

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Fiscal did not ask directly what the person who consulted the suspender had said ; but the question put amounted to that in substance, and its object was to discover what had been said.

As to the larger question, whether, apart from any peculiarity as to the oath, communications between penitents and their spiritual advisers were privileged it was maintained that they were so. There was not much authority on the point but Hume, vol. ii. p. 335, and Dickson on Evidence p. 939 were favourable to that view, and also Alison's Practice, 471, 586. In the cases of *Janet Hope* or *Walker*, High Court, July 29th 1845, Broun. vol. ii. p. 465, and *David Ross*, Inverness, September 21 and 22, 1859, Irvine, vol. iii. p. 434, such communications had been protected. It was admitted, however, that these were cases in which a prisoner had been induced to make disclosures, not cases of voluntary confession ; but the principle there adopted applied to this case. The principle was, that it was for the general interests of society, and conducive to the prevention of crime and the restitution of property, that a person accused, or a criminal, should be allowed to unburden his mind in safety to his clergyman ; just as it was held conducive to the general welfare to protect communications by criminals to their agents.

It was true that Taylor's Evidence 755-7, stated that such communications were not privileged by the law of England, but the authorities he quoted did not bear out his doctrine. The question was not raised purely in any of them ; *Rex v. Gilham*, 1828, 1 Moody Cr. Cas. 186 ; *Butler v. Moore*, 1802, MacNally's Rules of Evidence, 254 ; *Commonwealth v. Drake*, 1784, 15, Massachusetts Rep. 161. In *Broad v. Pitt*, 1828, 3 Car. and Payne, 518, Chief-Justice Best said, that he would not compel a clergyman to disclose such communications. Baron Alderson's opinion in the *Queen v. Griffin*, 1853, 6 Cox Crim. Cas., 219, was to the same effect. The

case of the *Queen v. Hay* was not adverse. It was maintained that it was proper and expedient to protect such communications in criminal cases. In any view, in the circumstances, the sentence was oppressive, and the suspender had been punished sufficiently—*Bonnar v. Simpson*, High Court, February 15th, 1836, Swinton, vol. ii. p. 39.

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The SOLICITOR-GENERAL and LEE for the respondents, the Procurator-Fiscal and Justice of the peace, answered, the obligation of a witness to disclose the whole truth depended in no degree on his oath, and he was guilty of contempt of court if he refused to answer, though he took no oath. The terms of the oath did not limit the complainer's obligation ; they only reserved to the suspender his legal rights, such as they were. Communications by an accused to a clergyman were not protected by the law ; and to hold that a clergyman was not bound to disclose them would give security and encouragement to crime. By the question put, the suspender was not asked to disclose what had been communicated to him, but merely to state what had occurred,—to tell that which was of the *res gestæ* in reference to the case under trial. It was necessary to compel disclosure in such cases, not only in order to insure the punishment of the guilty, but to prevent the imputation of crime to the innocent.

At advising, the judgment of the Court was delivered by

The LORD JUSTICE-GENERAL, who said, This case comes before us in the form of a bill of suspension and liberation, presented by the Rev. Patrick M'Laughlin, Roman Catholic clergyman, at Eastmuir of Shettleston, near Glasgow. He complains of a judgment and warrant whereby he was committed to the jail of Glasgow, therein to be detained for thirty days. That bill of suspension and liberation was in the first instance laid before Lord Neaves ; and his Lordship, in the exercise of the power vested in a single Judge, made an order for

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the interim liberation of the complainer, upon security being found that he would return to prison in the event of the bill of suspension being ultimately refused, when fully considered by the Court. The case was afterwards argued by counsel before the whole Court, and is now ripe for judgment.

It is not contended that there is on the face of the warrant any informality or irregularity. The contention is, that no warrant of imprisonment should have been granted in the circumstances.

The circumstances were these :—In the course of the trial of one Terence M'Ghee on a charge of theft, the complainer was examined as a witness for the prosecution, and being asked to whom he delivered a certain letter to be posted, he declined to answer the question, and, at an adjourned diet, having been asked whether he delivered the letter to the accused, he refused to answer. He was then informed that he was bound to answer, and the consequences of refusal were explained to him ; but he persisted in refusing to answer, whereupon he was held to be guilty of contempt of court, and was committed to prison, and to be detained there for thirty days. There can be no doubt that under ordinary circumstances, a witness refusing to answer such a question would be guilty of contempt of court, and be liable to imprisonment. But the complainer says that he had valid reasons for refusing to answer the question. The reasons are stated articulately in the bill of suspension, and were more fully explained and supported by argument from the Bar. I shall now advert to these reasons, and state my views in regard to them. I shall first consider the reason embodied in the fifth plea for the complainer. The fifth plea is as follows :—‘ The information possessed by the complainer in regard to the subject of inquiry before the Justice having been obtained by him as a confession from a penitent to a clergyman, and having been received on the footing that it should not be disclosed by the complainer, he

‘ was not bound to answer the question put to him.’ In order to understand the application of that plea to the facts of the present case, it is proper that I should mention the facts, and I shall take the narrative of them from the complainer’s statement in his bill of suspension. In the 6th article, the account he gives of the matter is this :—‘ In the course of the trial it appeared that Terence Ferguson referred to, who was unable himself to write, had got a young girl, daughter of the accused, to write a letter to his (Ferguson’s) father, in which was enclosed two half-sovereigns, and that the letter having been addressed, it had been put into the hands of the accused to be posted at Tollcross ; but upon reaching its destination the money was found to have been abstracted, and that this had led to a communication with the post-office officials at Tollcross and Glasgow, but that in the meantime Terence Ferguson had received an envelope addressed to him, enclosing a bank note for £1, and a paper containing in writing the following words, viz :—‘ This is the pound-note which you sent to your father, and which had gone amissing,’ or words to that effect.’ The 7th article goes on to state :—‘ These words above quoted were written by the complainer, and this fact had come to the knowledge of the prosecutor by the following means : —A letter, dated 29th November 1862, was addressed to the complainer by Mr. A. M’Call, superintendent of police at Glasgow, professing to make inquiry as to the character of the parties, M’Ghee and Ferguson, to which the complainer sent an answer, giving the information asked, and by comparison of the writing, it was seen that the complainer had been the person through whom the restitution of the missing money had been made, and a wrong done had been redressed. When called as a witness, the complainer, before any examination was commenced, explained that he had conscientious objections to take the oath in the form usually administered, and as proposed to be adminis-

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'tered to him. He fully and anxiously explained to Mr. Kidston, the presiding Justice, and in open Court, the grounds upon which he rested his objections,' and then he was put upon oath in certain terms. Statement 10 proceeds :—'The examination of the complainer as a witness was proceeded with, and the complainer, in answer to the prosecutor, stated, that he had addressed the envelope containing the one-pound note, and had written the accompanying explanation, and that he had enclosed the note and sealed the envelope. Being then interrogated, 'To whom did you deliver it?' The complainer declined to answer that question. It would have involved a violation of the complainer's duty as a clergyman, and he must have revealed a confidential communication from a penitent had he answered the question put to him. He would have violated his conscience had he done so. The oath he had taken did not require him to answer that question, and he was required to take no other oath. He adhered to his declinature to answer that question. After considerable discussion, the Court adjourned till Thursday the 11th December, in order that the complainer might reconsider the position in which he was placed.' At the adjourned diet the question was put to him, 'Whether he had given the letter containing the one-pound note to the accused party, Terence M'Ghee, for the purpose of being posted?' and that question he declined to answer.

When the case was argued at the bar, the counsel for the complainer, in answer to a question from the Court, stated that the communication made to him by the penitent was not made in the Confessional, properly so called, and that, as regards privilege or confidentiality, it was in no different position from a communication made to a clergyman, of any other persuasion, by a penitent member of his flock, who desired to relieve his conscience, and to receive spiritual advice and consolation. Having placed the question on that broad ground

the argument for the complainer was directed to show that, according to the law of Scotland, a clergyman is not bound to disclose communications so made to him.

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It was not, indeed, said that the circumstances under which the complainer received the communication of

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the penitent were exactly those contemplated in the leading authorities referred to, but it was very forcibly argued that the principle extended to them. It appears to me to be unnecessary to inquire into, or to pronounce any opinion upon either the existence or the scope of the principle contended for, as to penitential confessions of criminals to clergyman, because I am very decidedly of opinion that there is neither authority nor principle for holding, that the question which the complainer refused to answer comes within the operation, of even the widest range, of any rule of confidentiality recognised in our law, or suggested anywhere by our law writers. Assuming though not asserting, that the law may regard as confidential, and therefore not to be disclosed, a confession made by a criminal to his spiritual pastor, to ease his conscience and obtain consolation and advice, and even that it protects from disclosure the whole of what I may call the spiritual intercommuning between them,—no one has ever said that it goes further, and extends, not to anything said by the penitent to the priest, or by the priest to the penitent, in the course of that spiritual intercommuning, but extends to every act afterwards done by either of them, if it can be regarded as a consequence of the confession made. In such acts, the priest is not engaged in the exercise of his spiritual functions ; the penitent is not engaged in confessing to his spiritual adviser. For instance, in the present case, it was not in the exercise of any spiritual functions that the complainer wrote the letter, or that he give it to A, B, or C, to be posted. These were rather the functions of an agent than of a priest. I have no doubt that in taking them upon himself the complainer was actuated by the best motives—kindness

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to the penitent, justice to the party who had been injured, duty to the community. The advice which he gave, and the trouble he took to put it in train to be carried into execution, are deserving of all commendation. But the fact to which the question referred was altogether *ultra* of the penitential confession and the spiritual advice and consolation, which cannot, in any view of them, go beyond what the penitent said to the priest, and what the priest said to the penitent. It may be that acts done either by the priest or by the penitent himself, within the knowledge of the priest, after confession and consequent on it, are of a nature calculated to connect the penitent with the crime. But I know of no authority or principle for holding that they are protected as confidential by our law. Let it be supposed that in the present case the priest had given the sealed letter to his servant, with instructions to deliver it to the accused, could that chain of evidence be excluded or be broken on the plea of confidentiality? Plainly not. If the principle contended for does exist, and could be extended to such a case as this, it would be next to impossible to define its limit, and the course of justice might be extensively and prejudicially interrupted. I therefore hold that the question which the complainer refused to answer was one which he was not entitled to refuse to answer, on the ground set out in the fifth plea in law.

Another reason assigned by the complainer for not answering the question, is rested on the manner in which he was sworn. That ground of suspension is embodied in the first three pleas in law appended to the bill of suspension. The facts connected with this part of the case are thus stated by the complainer in the 8th and 9th articles of the suspension :—‘ When called as a witness, the complainer, before any examination was commenced, explained that he had conscientious objections to take the oath in the form usually administered, and as proposed to be administered to him. He fully

‘and anxiously explained to Mr. Kidston, the presiding Justice, and in open Court, the grounds upon which he rested his objections, being in substance, that according to his conscience, if he were, in the matter before the Court, to take an oath which would bind him to answer every question which the prosecutor might choose to put to him, this might, and probably would, involve a violation of his duties as a clergyman and a priest called upon to receive confidential communications from a penitent. The complainer at same time stated his willingness to take any oath that would not necessarily place him in such a position, or lead to violation of what he believed, and now believes in his conscience, to be his duty, and stated as follows :— ‘I am willing to swear that anything I say shall be true to the best of my knowledge.’ To this the prosecutor strenuously objected, but after a conversation between the Assessor, Mr. George Crawford, and Mr. Kidston, in the course of which the Assessor said, referring to the complainer’s suggestion as to the oath he was willing to take, ‘he only excludes the words “whole truth”—there may be something within his knowledge which he will not divulge,’ the presiding Justice agreed to administer the oath which the complainer could conscientiously take. Accordingly an oath in the following terms was tendered and taken, viz.—‘I swear by God I shall tell the truth, and nothing but the truth, and whatever I shall say in this case shall be the truth.’ No further or other oath was therefore either tendered or taken by the complainer. The oath he had taken did not require him to answer that question, and he was required to take ‘no other oath.’ It appears to me that in this part of the proceedings there was a mistake on the part of the Justice of Peace. He appears to have acted under misapprehension, and to have departed from the strictly regular course in order to accommodate matters to the wishes and scruples of the complainer. The counsel for

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to disclose, the taking of the oath in the usual terms will not, in the slightest degree, deprive him of the right to refuse to disclose it. To hold otherwise would be to misconstrue the oath. The complainer, therefore, was not entitled to refuse to take the oath in its ordinary form, and the refusing to do so was itself an offence for which he might have been punished with immediate imprisonment. I think that in this case it would have been a more regular course to have explained to the complainer the obligation he was under to take the oath—the insufficiency and inadmissibility of his objection to do so, and if he had persisted in refusing to take the oath, to have punished him for such refusal. But the Justice of the Peace, apparently desirous to obviate the complainer's scruples and objections, however mistaken and unreasonable they might be, agreed to omit from the oath the words 'whole truth.' This was unfortunate, because it appears to have led the complainer to take up the notion that he was now under no obligation to tell the whole truth, and might withhold any facts which, in his judgment, though not in the judgment of the Court, it would be improper for him to disclose. There again the complainer mistook his true position. The omission of the words from the oath did not relieve the witness from his legal obligation to tell 'the whole truth,' by which I mean, to answer every question excepting on such matters as the law permits a witness to refuse to disclose. The Court did not, and could not in any form, and certainly not in the form of omitting these words from the oath, make a transaction with a witness, whereby he should be at liberty to tell as much or as little as he might think proper—to refuse to answer any question which, in his opinion, might bear against the accused, and to give only such answers as he thought might tend the other way. The counsel for the complainer did not contend for any such extravagant proposition. He did not contend that he was relieved from answering any

question at his pleasure, but only that he was relieved from answering certain questions, namely, questions bearing directly or indirectly on what he regarded as a confidential communication made to him by a penitent. But if that be so, the necessary inference is, that the right to decline answering depended, not upon the words of the oath, but on the nature of the question, and the validity of the objection to answering it; and, consequently, if there was no valid objection to the nature of the question—if there was no legal right or duty to withhold the information asked, it was incumbent on the witness to have answered the question, notwithstanding the omission from the oath of the words referred to. Further still, the very terms of the oath, even as mutilated, imported an obligation to tell the whole truth just as much as if it had not been mutilated. The complainer swore that he would tell the truth, which meant that he would give a true answer to such questions as might be competently put, and which he had no valid ground in law for refusing to answer. For these reasons, I am of opinion that the pleas founded upon the terms in which the oath was administered are not valid to the effect of relieving the complainer from the charge of having been guilty of a contempt of court, for which he was liable to imprisonment. At the same time I think it not unlikely, that the departure from the ordinary course of proceeding in reference to the oath may, to some extent, have misled the complainer into an erroneous notion as to the nature of his position. I cannot regard that as a justification of his refusal to answer, although I think it might fairly be regarded as a circumstance in mitigation.

The only other ground of suspension is that embodied in the fourth plea:—‘ It was irregular and incompetent for the Justice to issue the sentence and warrant complained of, in the face of the offered plea of guilty by the accused party, which would have rendered any procedure against the complainer as a witness unne-

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lin v. Dou-
glas and
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lin v. Dou-
glas and
Kidston.
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' cessary.' The facts on which that plea is rested are thus stated by the complainer in the 13th article :—' It having been then stated by the presiding Justice that the complainer would be committed to prison for a contempt of court, the agent for the accused party, M'Ghee, with the sanction and authority of the accused, intimated that he was ready to plead guilty to the charge against him, in order to obviate the necessity for the complainer's imprisonment or examination ; but the Court refused to accept of such a plea.' And in the 15th article—' The sentence and warrant are silent as to the plea of guilty tendered by the accused, which plea would in any view have rendered entirely unnecessary any proceedings against the complainer.' The counsel for the complainer stated that he did not abandon that ground of suspension, but he offered no argument in support of it. We must, however, dispose of it, and we can only do so by repelling it. I can understand that a generous impulse might prompt Terence M'Ghee to offer himself as a sacrifice to save his respected pastor from imprisonment, if it were practicable to save him. I do not understand the confusion of ideas which led him and his agent to imagine, that by going through the form of pleading guilty to a theft of which he was protesting his innocence, he could relieve another person of the consequences of a contempt of court, which that person had committed. I give my learned friends credit for the ingenuity which must have been exerted in embodying this incident into a presentable plea ; and I am not surprised that their ingenuity was so much exhausted by the effort of constructing the plea, that it failed to supply them with any argument in support of it.

The result arrived at on the whole matter is, that the complainer was guilty of contempt of court, meriting imprisonment ; that the plea of confidentiality, whether it has or has not any positive place in our law, in reference to communications made in cer-

tain circumstances by a penitent to his spiritual pastor certainly has no place in reference to such a question as the complainer refused to answer, and that the plea rested on the terms in which the oath was administered is not well founded as a justification of the complainer's conduct, but that, in the position in which he was placed by the departure from the ordinary and regular course of procedure in reference to administering the oath, may be found grounds for mitigating the sentence. But, in expressing this opinion, I do not mean to suggest that imprisonment for thirty days is a sentence too severe for contempt of court. Many cases may be figured in which it would be much too lenient a sentence. Contempt of court may, as in the case of other offences, be attended by circumstances of aggravation or of palliation, and the measure of the sentence must depend on the nature and circumstances of the case. In the present case, the circumstance I have already alluded to is one which may fairly be taken into account on the side of mitigation. The conduct of the complainer in causing restitution to be made to the injured party is also a favourable circumstance in his case, and we cannot altogether throw out of view the testimony borne to his character and usefulness by the Procurator-fiscal in the course of the trial. Looking to all these circumstances, I think we may entertain the belief that, in refusing to answer the question, he was not actuated by a desire to screen guilt and obstruct the due course of justice ; and we may also entertain the hope, that the duty of a witness having now been explained to him, he will not forget it, or again so far mistake his position ; and that the complainer, having already been in prison for a period of about fourteen days, the law will be vindicated and justice done by dispensing with any further execution of the sentence.

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The Court pronounced the following interlocutor :—
“ 17th January 1863.—The Lord Justice-General,

No. 59. ' Lord Justice-Clerk, and Lords Commissioners of Justi-
 M'Laugh- ciary having resumed consideration of this case—in re-
 lin v. Dou- spect that the complainer was guilty of contempt of
 glas and ' court, and that he was lawfully adjudged to be com-
 Kidston. ' mitted to the prison of Glasgow for such contempt—
 High Court. ' Therefore, and to that extent and effect, refuse the
 Jan. 17. ' bill, but find that, in the circumstances now stated,
 1863. ' and the complainer having already undergone impri-
 Suspension. ' sonment for thirteen days, further execution of the
 ' sentence should be dispensed with : Therefore, to that
 ' extent and effect pass the bill, suspend the further ex-
 ' ecution of the sentence, and discharge the suspender's
 ' obligation under his bond of caution to return to
 ' prison : Find the complainer liable in expenses, which
 ' modify to ten guineas, and decern.'

JOHN ROSE, S.S.C., MURRAY and BEITH, W.S.—Agents.

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Present,

THE LORD JUSTICE-CLERK,

LORDS COWAN AND DEAS.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Young—Gifford A.D.*

AGAINST

CHARLES STEWART DAVIDSON AND STEPHEN FRANCIS—*W. A. Brown.*

BASE COIN—STATUTE 24TH AND 25TH VICT. C. 99—PROCEDURE—INDICTMENT—PREVIOUS CONVICTION—FOREIGN.—An indictment charging offences against the Coinage Act, 24th and 25th Vict. c. 99, ought to be framed, and the trial conducted according to the forms and procedure in use in Scotland ; and the provisions in the 37th section as to the mode of libelling previous convictions, and as to the mode of trial in the case of previous convictions, do not apply to trials in Scotland. (2.) Previous convictions are therefore to be set forth in the indictment in the usual manner, the provision that the substance and effect of such convictions should

be set forth, not referring to procedure in Scotland. (3.) A panel is relevantly charged with the high crime and offence in the 12th section (uttering, or possessing with the intention to utter counterfeit coin, after a previous conviction), although the previous conviction libelled be a conviction by the English Court.

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CHARLES STEWART DAVIDSON and STEPHEN FRANCIS
were indicted and accused :—

THAT ALBEIT, by an Act passed in the twenty-fourth and twenty-fifth years of the reign of Her Majesty Queen Victoria, chapter ninety-nine, entitled, ' An Act to Consolidate and Amend the Statute Law of the United Kingdom, against Offences relating to the Coin,' it is enacted by section ninth of the said Act, that ' Whosoever shall tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanour, and in Scotland of a crime and offence; and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement: ' And it is enacted by section tenth of the said Act, that ' Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanour, and in Scotland of a crime and offence; and being convicted thereof, shall be liable, at the discretion of Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement: ' And it is enacted by section eleventh of the said Act, that ' Whosoever shall have in his custody or possession, three or more pieces of false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put

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No. 60. ' off the same, or any of them, shall in England and Ireland be guilty
 C. S. Da- ' of a misdemeanour, and in Scotland of a crime and offence; and
 vidson and ' being convicted thereof, shall be liable at the discretion of the Court,
 S. Francis. ' to be kept in penal servitude for the term of three years, or to be
 High Court. ' imprisoned for any term not exceeding two years, with or without
 Feb. 2. ' hard labour, and with or without solitary confinement : ' And it is
 1863. ' enacted by section twelfth of the said Act, that ' Whosoever having
 Base Coin. ' been convicted either before or after the passing of this Act of any
 ' such misdemeanour or crime and offence as in any of the last three
 ' preceding sections mentioned, or of any felony, or high crime and
 ' offence against this or any former Act relating to the coin, shall
 ' afterwards commit any of the misdemeanours, or crimes and offences,
 ' in any of the said sections mentioned, shall in England and Ireland
 ' be guilty of felony, and in Scotland of a high crime and offence;
 ' and being convicted thereof, shall be liable, at the discretion of the
 ' Court, to be kept in penal servitude for life, or for any term not less
 ' than three years, or to be imprisoned for any term not exceeding
 ' two years, with or without hard labour, and with or without solitary
 ' confinement : ' YET TRUE IT IS AND OF VERITY, that you the said
 Charles Stewart Davidson and Stephen Francis are, both and each or
 one or other of you, guilty of the statutory crimes and offences set
 forth in the above-recited ninth, tenth, and eleventh sections of the said
 statute, or one or more of them, actors or actor, or art and part : And
 you the said Stephen Francis are further guilty of the high crime and
 offence set forth in the above-recited twelfth section of the statute,
 actor, or art and part.

One of the previous convictions in respect of which the ' high crime and offence ' set forth in the 12th section was charged against Francis, was stated to be a conviction obtained

before the General Sessions of the Justices of the Peace held at the Old Bailey, in or near the City of London, on the 4th day of July 1859, of the crimes and offences respectively first and second set forth in the seventh section of the Act passed in the second year of the reign of His late Majesty King William the Fourth, chapter thirty-four, entitled, ' An Act for Consolidating and Amending the Laws ' against Offences relating to the Coin,' being the same, or such crimes and offences as are respectively mentioned in the ninth and tenth sections of the said statute of the twenty-fourth and twenty-fifth years of the reign of Queen Victoria, chapter ninety-nine, and that on an Indictment charging you with the commission of the said crimes and offences first and second set forth in the said seventh section of the

said Act of the second year of the reign of His late Majesty King William the Fourth, chapter thirty-four.¹

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¹ The 34th section of the Act 24th and 25th Vict. c. 99, provides, *inter alia*, that, ' All high crimes and offences, and crimes and offences against this Act, which may be committed in Scotland, shall be proceeded against, and tried according to the rules and procedure of the criminal law of Scotland.'

The 37th section of the Act provides :—' Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the Clerk of Court or other officer, having, or purporting to have, the custody of the records of the Court, where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction without proof of the signature, or official character, or authority of the person appearing to have signed the same, or of his custody, or right to the custody, of the records of the Court; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows—that is to say, the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence; and if he plead "Not guilty," or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if, on arraignment, he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the Court shall proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last-mentioned inquiry.' Then follows a proviso as to the evidence of the character of the panel.

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W. A. BROWN—for the panel Francis, objected that 'the substance and effect' of the previous conviction were not set forth in the indictment.

The SOLICITOR-GENERAL and GIFFORD—for the prosecution, answered that the 37th section did not apply to Scotland, except, perhaps, the provisions as to proving the previous conviction. At all events, the substance and effect of the previous conviction were sufficiently set forth.

LORD COWAN.—Section 34 declares that all offences committed in Scotland shall be proceeded with according to the criminal law of Scotland. I cannot doubt that this was done in order to preserve the existing modes of trial. The very next section, 35, (referring to accessories before and after the fact), is obviously inapplicable to Scotland, and section 36 (regarding offences on the high seas), contains the adoption by the Legislature of proceedings already in use in Scotland. The mode of charging previous convictions in Scotland is part of the law of Scotland which is preserved by this Statute. As to the part of section 37 which relates to the form of trial; here also, I have no doubt that the rules and procedure of the law of Scotland are preserved. The Solicitor-General says there may be some doubt as to the evidence of previous conviction, and on this I do not think it necessary to pronounce an opinion; but if there is a difference between the evidence required in the two countries, a further question will arise, whether section 29 (defining what is to be sufficient evidence of the coin being counterfeit) is applicable to Scotland? On the grounds stated, I am for sustaining the relevancy.

LORD DEAS.—It appears to me that the manner of libelling the previous conviction is one of the matters to be regulated, under section 34, 'by the rules and procedure of the criminal law of Scotland.' But if we were not also to hold that these words apply to and include the rules of evidence, we should land ourselves in inextricable confusion. Rules of evidence belong to the

matter of remedy. It is true the contrary was held by the First Division in *Glyn and Co. v. Johnston and Co.*, where the question was as to the competency of proof by parole of the non-onerosity of a bill payable in England. But the case of *Don v. Lippmann* (2 S. and M'L. 682), and other subsequent cases in the House of Lords, have shown that to be an unsound decision. In my view, no part of section 37 is applicable to Scotland. A number of other sections of the Act are obviously inapplicable to Scotland, such as sections 29, 35, 41, and 42, the first of which (section 29) introduces into England a part of what was previously law in Scotland. The phraseology of the Act varies, so as to be applicable to Scotland, whenever it is intended that the clause shall apply to Scotland.

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LORD JUSTICE-CLERK.—I have no hesitation in saying that the charge is well libelled. Section 34 makes it clear that we are to proceed under our own rules, and more especially as to the mode of libelling.

LORD DEAS.—Before an interlocutor of relevancy is pronounced, I think we must consider the question which arises on the face of the libel as to founding upon the English conviction. The case of *Dempster*, High Court, January 13, 1862, Irvine, vol. iv. p. 143, was decided by a majority of a bench of three Judges, and only one of these Judges is now present.

This is a stronger case for rejecting the conviction than *Dempster's*. You would make an English conviction of misdemeanour or felony, raise what in Scotland would only be a crime and offence, to a high crime and offence. I am not bound to know what is a misdemeanour or felony in the law of England, which attaches a meaning to these words not technically given to them in Scotland.

I think this question is intimately connected with that of the mode of pleading. If a prisoner is tried in England, the previous offence which brings the misdeameanour up to a felony, cannot be brought

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against him until he has first pleaded to the misdemeanour ; and can we deal with an English conviction, and yet deprive the prisoner of this benefit ? I would prefer to give no decision without a full bench.

LORD COWAN.—This is a British Statute applicable to the United Kingdom, and its object was to have it fixed within the United Kingdom, that a person who commits an offence against the coin in any part of the United Kingdom, and repeats the offence, is not to be considered as if he had only committed the simple crime. Section 12 contains no limitation as to parts of the United Kingdom. I see no disadvantage to the prisoner in the Scotch mode of pleading. In a common theft, the jury must first apply their minds to the substantive charge, without taking the convictions into account. Then as to the other question, I think the previous conviction is well libelled, and that the libel is relevant.

LORD DEAS.—In *Dempster's* case it was decided by a majority of one that an English conviction of theft might be libelled as an aggravation. This was then so decided in this High Court for the first time. When I was Crown counsel, English convictions were often sent up by the Procurators-fiscal, but never made use of. The opportunity of using them has been the same since the Union as it is now. It would have been desirable that such a point had been brought up for decision before the whole Court. It is not a question on which I am disposed to give an opinion, without hearing it argued, but a single decision can hardly be held to fix the law. It is said, however, that even if that decision be wrong, still, in this case, the conviction is rightly libelled on. I think, on the contrary, that, under this Statute, it is more difficult to take the Crown view than in the case of a common previous conviction. Such a conviction is founded on only as an aggravation. Here the previous conviction serves to create a different and higher offence. The Statute refers separately to the two countries : its phraseology goes on this principle

throughout. The words denoting a contravention in England and Scotland are to be applied *singuli singulis*. If you read the Statute otherwise, all acts of contravention in England might be tried in Scotland, and *vice versa*. That, certainly, was not intended. It is a previous conviction for misdemeanour in England that raises the crime to felony in England. The whole thing that constitutes the felony must have taken place in England; and in the same way, the whole thing which constitutes the high crime and offence must have taken place in Scotland. So I read the Statute. I am strengthened in this interpretation by the terms of section 34, which bears, 'All high crimes and offences, and 'crimes and offences committed in Scotland, shall be 'proceeded against and tried according to the rules and 'procedure of the criminal law of Scotland.' Was this high crime and offence committed in Scotland? As a high crime and offence it was not. If your Lordships were right as to this matter, it would shake my view of the procedure under section 37; for if an English conviction were to be received at all, it ought only to be received, as in England, after the rest of the case is proved. But our rules and forms of procedure do not permit of that being done, and so your Lordships have just decided. That tends I think, to favour the rejection of it altogether. We know nothing of the regularity or irregularity of English convictions, or even of the jurisdiction of the 'General Sessions of the Justices of the 'Peace held at the Old Bailey,' before which this conviction is said to have been obtained. All this goes to confirm my idea that the Statute was not intended to introduce any novelty. Indeed it is quite plain that if an English conviction can be used for the purpose proposed under the Statute, it might have been equally used for that purpose under previous Statutes; for instance, under the Statute 2d Will. IV. c. 32, passed in 1832. That was a British Statute like the present; but during the thirty years and upwards which have intervened, I am

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not aware that the public prosecutor has ever once made the attempt till now. I dislike such innovations, and I do not think the Statute authorizes what is here proposed to be done. Crimes and offences, and high crimes and offences, are, I think, exclusively to be dealt with in Scotland, and misdemeanours and felonies in England, and the clauses applicable to the one are not applicable to the other.

LORD JUSTICE-CLERK.—The question is a different one from what occurred in the case of *Dempster*. There the question did not arise, and could not have arisen, upon the relevancy, but on trial—on the admissibility of evidence. We were unfortunately obliged to decide it there and then, and were of opinion that the English conviction was an admissible aggravation. Lord Deas is mistaken in supposing that to be the first time that an English conviction was proposed to be made use of either in the High Court or a Circuit Court. Such a proposal was made and successfully, at the Perth Circuit 1839, when the Court, after argument and deliberation, admitted it—(Bell's Notes to Hume.) So *Dempster* does not stand alone. On that case I see no reason to change my opinion ; but here the question is different, 1st, as arising on relevancy ; 2dly, as depending on the construction of the clause of a Statute. Section 12 is what we have specially to do with, but we must keep in mind the preceding sections. Section 9 enacts, that whoso utters base money, knowing it to be so, is liable to be imprisoned—the maximum period being one year. That offence may be tried by any court in the United Kingdom having jurisdiction to pronounce a sentence of imprisonment for such a period. The Statute calls this a misdemeanour when to be tried in England, and a crime and offence when in Scotland ; but the technical name does not, in the slightest degree, vary the nature of the contravention of the Statute or the amount of punishment. Contravention of section 10 is in like manner called a misdemeanour in England,

and a crime and offence in Scotland ; but it is quite the same contravention, whether in England or in Scotland, and so with section 11. With this light, we come to section 12, and put the question, what is the difference between a misdemeanour and a crime and offence ? It is not a difference in the offence—it has nothing to do with the substance of that for which the pursuer is tried : it is only a technical name in pleading. By that section, if he again commits a further contravention (whether in England or Scotland), he incurs a higher liability. To construe this section in any other way, it must be supposed to contain two separate enactments, mixed up in so confused a manner as to be a very bad, and indeed quite an unprecedented style of legislation.

The panels pleaded guilty, and Davidson was sentenced to eighteen months' imprisonment, and Francis to six years' penal servitude.

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Present,

THE LORD JUSTICE-CLERK,

LORDS ARDMILLAN AND NEAVES.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Young—Gifford A.D.*

AGAINST

ALEXANDER MILNE.—*Scott—Home—J. C. Thomson.*

Feb. 9, 10,
11, 1863.

MURDER—INSANITY—SPECIAL DEFENCE—MEDICAL WITNESS—DECLARATION—EVIDENCE—VERDICT—In a trial for murder, where the panel pleaded insanity at the time the act was committed, medical witnesses were, on the motion of the counsel for the panel, allowed to remain in Court while the general evidence was being led, the counsel for the prosecution not objecting to the course.

2. Circumstances in which it was held that a Lieutenant of Police and a Police Surgeon were justified in putting certain questions to a prisoner supposed to be insane, who had been brought to the office on a charge of murder, but who had not as yet emitted a judicial declaration : held also that the answers to these questions were admissible in evidence.
3. Objection was taken to the admissibility of a declaration, on the ground that when it was emitted the panel was not in his sound and sober senses, and proof was offered in support of the objection,

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which was stated to be generally the same evidence as was to be adduced in support of a special defence of insanity. The declaration admitted in the meantime, reserving to the Court, should they see cause, to direct the jury that it was not evidence against the panel in respect of his condition when it was emitted.

4. A prisoner's declaration is an element of evidence in the question of his sanity or insanity.
5. Statement of the law as to insanity when pleaded as a defence to a criminal charge.
6. A panel convicted of the crime of murder notwithstanding alleged insanity at the time when the act was committed.

ALEXANDER MILNE was charged with the crime of murder—

IN SO FAR AS, on the 7th day of January 1863, or on one or other of the days of that month, or of December immediately preceding, in or near the shop or premises in or near Frederick Street, or South Frederick Street, Edinburgh, then occupied by you the said Alexander Milne, or by the firm of A. Milne & Company, of which you were a partner, you the said Alexander Milne did wickedly and feloniously attack and assault James Patterson, working jeweller, then or lately before residing with Ann Irvine or Wilson, in or near St. James' Square, Edinburgh, and did with a dagger, or poignard, or stiletto, or with some other instrument to the prosecutor unknown, stab or cut him in or near the left breast or other part of his person, whereby he was mortally wounded, and immediately or soon thereafter died, and was thus murdered by you the said Alexander Milne.

A special defence was lodged for the panel, setting forth that at the time of the act charged he was insane and labouring under insane delusions.

THOMSON, for the panel, then represented that in the list of witnesses for the prisoner there were various medical men who were to be called to speak to the special plea which had been urged. They were not themselves cognisant of the facts upon which that plea was based, and as the opinion which they would be asked to give was mixed up with the facts of the case, and as it would be most satisfactory that they, as well as the Court and jury, should without doubt be proceeding upon exactly the same facts, he moved the Court that the medical witnesses should be present while evidence as to the facts was being led.

The SOLICITOR-GENERAL, for the prosecution, consenting—

The Court granted the motion.

EVIDENCE FOR THE PROSECUTION.

ROBERT JOHNSTON, *one of the Magistrates of Edinburgh*.—The panel's declaration was emitted before me, in his sound and sober senses, I believe, quite voluntarily, and after warning. I warned him most carefully.

Cross-examined for the Panel.—There were several questions put to panel by the Procurator-Fiscal, none by me, though I may have suggested something as to the form of questions. I do not recollect that I was then told he had made a statement in the police office. Before the examination of the panel the certificate of 8th January 1863, by Dr. Littlejohn, was not shown to me. Dr. Littlejohn was in the room when I entered it, but left before me, and I understood it was with his full sanction the examination proceeded. Further than that I knew nothing of what Dr. Littlejohn had done, or what his opinion was. In the course of the examination I was informed by the Procurator-Fiscal that it was Dr. Littlejohn's desire that the examination should be proceeded with. I had no impression about the case as being peculiar, except that panel had been a drunkard. This I knew only from rumour.

JOHN OTTO MACQUEEN.—I am *interim* Procurator-Fiscal in absence of Mr. Dymock from bad health. I am an S.S.C. Panel's declaration was emitted in my presence, freely and voluntarily, and in his sound and sober senses, so far as appeared from anything that then took place. I believed him to be so; he was quite calm and self-possessed, and appeared thoroughly to understand what he was saying and doing. He received the usual warning from the magistrate.

Cross-examined for the Panel.—Previous to the declaration panel was brought to the Court-room by the city officers. I was not in the room with him before the declaration was taken. I was not aware that the day before he had made a long statement in the Police Office. [Shewn Dr. Littlejohn's certificate of 8th January.] I had not seen that certificate, but Dr. Littlejohn had seen panel at my request to ascertain whether there was anything to prevent his being examined on declaration. I had not seen panel when I made the request. I had understood panel was addicted to intemperance. It is usual to take such advice when there is any reason to suppose there may be cause why the panel should not be examined, as when he is addicted to intemperance. There was nothing else that led me to get this certificate. I put questions which were necessary to make his narrative complete and intelligible, but no other questions. All that he stated was taken down.

No. 61.
Alexander
Milne.

High Court.
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11, 1863.
Murder.

No. 61. *To the Court.*—I saw Dr. Littlejohn in the interval between his
 Alexander visit to the panel and the examination. He communicated his opinion
 Milne. to me, and I acted on it.

High Court. GEORGE GRAHAM, *Working Jeweller.*—I was in the employment of
 Feb. 9, 10, the deceased, in St. James' Square, for two years before his death.
 11, 1863 On Wednesday, 7th January, deceased sent me a message about
 Murder. 9.30 a.m. to the panel's in Frederick Street. Deceased was in the
 habit of doing work for panel. Deceased asked me to go along to
 panel about an order got the day before, for that panel had been the
 worse of drink that morning, and if he had forgot he might not take
 it off his hand. It was an order for 'Albert mounts.' He said
 panel 'was complaining of fever the night before, and you may ask
 'how he is.' I went to panel's, and found him in the front shop, and
 told him deceased had sent me to ask if he wanted the Albert mounts
 particularly to-day. Deceased told me to put the question in this
 way from delicacy. Panel said—'yes, we must have them to-day,
 'but send Mr. Paterson along to me immediately.' I asked how he
 was, and he said he was a great deal better. I knew panel previously,
 and there was nothing unusual about him that morning; he spoke
 quite calm, and was quite sober. Nobody else was in the shop.
 He came out of the back shop as I went in at the front door. He
 had a Highland cloak on, but no hat. I went back to deceased and
 gave him the message; he said he would go along to panel's. He
 dressed himself, and went out about 10.30 or 10.45 a.m. As he
 went out he said—'I won't be long.' I never saw him again. Panel
 used to come occasionally with orders to deceased; also sometimes in
 the evening to visit him as a friend. They got more intimate towards
 the end of the two years I was with deceased. They were at the theatre
 together I believe the Monday before Christmas. Milne came to ask
 him to go about 7, but deceased said he could not go then, and
 I left them together in the shop, and I understood they went afterwards
 to the theatre. John Paterson was an apprentice of the deceased.

Cross-examined for the Panel.—When I returned to deceased from
 panel's, I told deceased that panel was much better that morning.
 I was in deceased's shop when he came in that morning; he was not
 dressed to go out; had not his boots on. I never knew of deceased
 going out before I came to work in the morning. He lived in the
 house where he worked. Deceased and panel seemed always on
 friendly terms. I never saw panel drunk.

Re-examined.—[Shewn two coats, vest, and trousers libelled.]
 Deceased was wearing these clothes when he went out that morning.
 [Shewn photograph likeness libelled.] That is a photograph of the
 deceased.

JOHN PATERSON.—I was an apprentice of the deceased for 15
 months before his death. He worked for panel. I saw panel fre-
 quently in deceased's shop. On Wednesday morning, the 7th January,

I was present when a message was sent by last witness to panel. He was desired to ask if he should go on with the order, and if panel was all well; this was about 10.20 a.m.; he came back about 10.45. I heard him deliver message to deceased, and deceased went out about 11. I never saw him again. I am no relation of deceased. I went to the shop that morning at 9; it was not open. I got the key out of deceased's room, the first door past the shop on the right hand. He lodged in Mrs. Wilson's house. I passed through Mrs. Wilson's room to deceased's. Mrs. Wilson slept in the first room. I went into deceased's bed-room, he was then not dressed. I am not sure whether he was in bed or dressing. I got the key and opened the shop. He came into the shop in less than half an hour; he was in his ordinary working-dress. Panel and deceased seemed always friendly. I never saw panel tipsy.

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ANN WILSON.—Deceased lodged with me from September last. He was unmarried. On morning of 7th at breakfast deceased told me he had sent a young man to ask for panel, and he had reported that panel was quite composed, and asked why deceased did not come himself. Deceased said he was going to panel's. I said I thought he should not go near him as he was an excitable man; that he would think nothing to say that deceased was too kind with his wife; these foreigners were very deceitful and cunning. I thought by panel's appearance and speech that he was a foreigner. I had seen him twice while visiting the deceased. I knew nothing otherwise about him, except that deceased told me panel had been drinking since before Christmas, and had gastric fever, and it was quite in his brain. I had seen him in an excited state when he was in my house on 23rd December last. Deceased had also told me he was sorry for panel's wife, for she was a very nice woman. It was for these reasons that I advised deceased not to go near panel on the 7th of January. Deceased made no answer to my advice, but put his boots and coat on. He left sometime between 10 and 11. The only times I saw panel in my house were the 23rd December and New Year's Day. On the last occasion he merely called in a cab. So far as I saw he was sober then.

Cross-examined.—The first room you come to in my house was Paterson's work shop. There is a passage with the Homœopathic Dispensary on one side, and my apartments on the other. Beyond deceased's work-shop you come to my room, and enter through it to deceased's bed-room. It was about 9 that panel came to see deceased on 23d December. They had one tumbler of toddy in my room, and went out together. It was shortly after this that deceased told me panel had gastric fever, and that it was quite in his brain. On New Year's Day panel called in a cab and saw deceased in the forenoon; I heard nothing pass between them except deceased saying,

No. 61. 'Milne you're not going to stop, you're going to the pantomime.'
 Alexander Milne. There were people in the cab, whom I supposed to be panel's wife and children. The panel said something about going to the pantomime, and that his wife was not coming out of the cab. Deceased was home on Monday evening the 5th by 11 or 11.15. I did not go out early on Monday morning the 6th. He was not later of coming home on Tuesday evening than 11.15 or 11.30, and he was not out on Wednesday morning till he went to panel's, and he could not be out without my knowledge. Deceased was a fine gentlemanly, good-natured man, about 29.

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 11, 1863.
 Murder.

PETER CAMERON, *Cutler*.—On 7th January panel came into our shop (West Register Street), and asked to see a dirk or stiletto which was in the window, I took three out of the window and showed them, he chose one, the weapon libelled is the one. He put it in his pocket and said that would do, and then he asked the price, I said 3s. 6d., he paid, and went away. Panel said nothing else; nothing else passed. He was quite sober, but he smelt of drink—nobody was with him but a boy; William Ruddiman was in the shop.

Cross-examined.—Panel looked calm and quiet—no shaking of the hand. I never saw him before, but I can swear panel is the man. I saw him again on the Saturday following. The smell of drink was like fresh drink.

WILLIAM RUDDIMAN.—I saw Cameron sell the stiletto to panel between 9 and 10 of the morning of the 7th. Panel looked at it for a while and said this would do. He took it out of the sheath to look at the blade. He said nothing else; he seemed sober.

Cross-examined.—Panel turned towards St. Andrew Square when he left.

HELEN MILNE.—I am a daughter of the panel, and am 8 years of age. We lived below the shop of my father. I have no sisters, but two brothers, William Alexander and James Lorson—William is 6, James is 4. Nobody lived in our house but my father, mother, brothers, and myself. No servant. There is a stair from the back shop down to our kitchen, the first place is our kitchen. I knew deceased, he lived in 5 St. James' Square. Last time I saw him was on Wednesday, that day he was killed, mamma was taking her breakfast in the kitchen when I saw him. I was in the first room, my brothers were up stairs in the back shop. I saw deceased at the door of the first room I was in leading to the area. There is a door from the area to the street, but it is kept locked. I did not see where the deceased had came from. He was running out into the area saying he was stabbed. There was nobody in the room with me. I was sitting at the fire, mamma came into the room, and into the area after the deceased. I saw my father coming down the stair from the back shop to the kitchen a little after deceased went into the area.

Cross-examined.—I remember a Christmas party last Christmas at home, Mr. and Mrs. Kilgour, Mr. Moodie, Mr. Brunton, Mr. Millar, and deceased were there. We were there too, I and my brothers, and papa and mamma, the party was in the front room down stairs. I saw Mr. and Mrs. Kilgour go away, but I was in bed before the others went away. On New Year's Day I went in a cab with papa, mamma, and my two brothers, to St. James' Square to deceased; mamma did not want to go out of the cab, but papa went in to deceased. We did not go to the pantomime, because it was too crowded. Papa said deceased was always very kind to me. I remember his giving us oranges the Saturday before deceased was killed, this was in the room behind the shop; papa was there. Deceased staid a good while that day. I remember Dr. Sidey coming, father was in bed. After the doctor went away I was sent for medicine by mamma. She gave me a paper and money, I went to Gardner and Ainslie's, I got a bottle from them which I took to papa. Deceased was in our house that day; I saw him take up the bottle and look at the ticket, and smell the cork without taking it out. I don't know if prisoner saw deceased do that. Papa said there was poison in the bottle; this was after deceased left, and he said deceased had put the poison in. Papa did not take that medicine, and I was sent for another bottle the same day as I got the first, I took the same paper to Hearder, apothecary, Frederick Street, I got another bottle from him and took it home, and papa took the medicine which was in that bottle. Papa said that day that deceased had poisoned him with quicksilver, and that he had poisoned me and my brothers with quicksilver too, deceased gave me no quicksilver. This day papa was in bed in the back shop. This was the room where we all slept. The day of deceased's death was the first day we had a fire in the front room down stairs, that week mamma put on the fire at papa's desire, I don't know what for. The night of the day I went for the bottle after I was in bed I heard a noise at the front door, papa said there were thieves there, he cried out 'thieves;' papa went to the front shop, mamma and all of us were crying, we were very frightened. Papa came back again into the back room a little while and then went down stairs, I was asleep before he came back; the same day he said something about cigars, I don't know what. Deceased had before that gone out one day with my brother Willie to buy cigars for papa, and Willie had come back with the cigars, but without deceased returning. When I saw papa coming down the back stairs, (after deceased cried he was stabbed), he was white in the face and had on his top coat, he had nothing on his head.

Re-examined.—The prisoner at the bar is my father.

To the Court.—Papa was keeping his shop the day before deceased was killed the same as usual. My mother kept the shop the day my

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No 61. father was in bed ; my father was in bed on the Sunday before deceased
 Alexander Milne. was killed all day.

High Court. MARGARET FINLAY.—In January last I was living with my sister
 Feb. 9, 10, in Stockbridge. I was in Frederick Street between 11 and 12, about
 11, 1863. 11.20, on the 7th January, I was on the east side of the street, and
 Murder. when I was passing panel's shop, I saw a gentleman in the area
 dressed in a suit of black with a top coat and a hat ; he was standing.
 At first I saw nothing particular, but all at once he rushed to the north-
 east corner of the area, he put his knee on some flower boxes and got
 over the railing, his hat fell off into the area as he was getting over,
 that was all I saw, I went on and did not look round ; I returned the
 same way between 12 and 1. On the mound I had seen the police
 going with stretchers, and I saw they went to the shop next panel's,
 and I then learnt that a man had been stabbed. The gentleman I
 saw in the area I had never seen before, I did not hear him speak,
 and what I saw was merely in passing.

JOHN WATSON.—*Criminal-officer*. On Saturday last I made mea-
 surements at panel's premises. From front door of front shop to top
 of back stair 25 feet 11 inches ; there are 13 steps in that stair, there
 is a passage from kitchen below to front room ; from the foot of stair
 in kitchen to the door leading from front room to area 26 feet 5 inches.
 From the area door to flower-box 13 feet 4, flower-box is 3 feet 7
 inches high, from top of flower box to level of Frederick Street is 3 feet
 7½ inches, from top of box to top of parapet wall north of area is 4 feet,
 height of railing in front is 2 feet 10 ; there are no spikes, but a smooth rail
 on top, the railings to the north are 3 feet 2½ inches with the spikes, at
 the north-west angle there is no spike. I saw the premises on the 7th
 January, there has been no change to affect the measurement since that.

JAMES LYONS, *aged 14, apprentice to Miller, a Plasterer*.—On
 Wednesday 7th January, about 11.15, I was passing up the east side
 of Frederick Street, and as I passed by Milne's shop, I saw a man
 leaning over the front railing of the area, and a woman in the area
 handing him his hat, he took the hat from the woman. The man said
 run for a doctor I am stabbed. He said this either to me or to the
 women. Then he put on his hat and ran into Forrester the baker's
 next door to panel's, the two doors enter from the same outside stair.
 I stood at the door, a gentleman in the shop opened the man's vest,
 then I saw his shirt all blood. The gentleman told me to go to
 Hearder's for spirits of ammonia, I went, and Hearder brought over
 the spirits of ammonia himself. When we came back the wounded
 man was still in the front shop, but he was then taken into the back
 shop. I then went away and saw no more.

BRUCE ALLAN, *Chemist, Howe Street*.—On 7th January I was
 passing along the east side of South Frederick Street about 11.15, to

11.30. I saw the deceased Paterson resting on the railing, standing on the street, in the act of putting his hat on, I thought he was fainting, and went to his assistance, he put his right hand to his left breast and said, 'Oh, I'm stabbed!' he then let go the railing with his left hand and staggered up the steps into Forrester's shop. On his way up his hat was falling off but he caught it. I followed into the shop. Deceased tried to sit down on a bench, but he slid to the ground and rested with his back on the form, repeating the words 'Oh, I'm stabbed!' A woman, Rodgers, (No. 14) was sent for a cab and a constable by me, I also sent a boy, Lyons, to Harder's. When I was standing on the landing in front of Forrester's, panel came out of his shop and came up to me and said, the fellow has been poisoning my wife and my children, I have caught him in bed with my wife, I am suffering from poison too. He appeared to be calm and sober. I put my hand on his right shoulder and gently pushed him into his shop, saying 'go into your shop, sir, and don't attempt to escape,' he said 'all right, sir,' and went in quite quietly. I then went into Forrester's and undid the vest of deceased, I found his linen saturated with blood, then Dr. Harder came bringing the stuff I had sent for. He and I carried deceased into back shop and examined him, and found a wound an inch long in the left breast opposite the region of the heart; he was alive then, but not conscious, and almost immediately afterwards died after a few convulsive respirations. From the time I found him leaning on the railings till his death would be 10 to 12 minutes. He became insensible immediately after the second time he repeated the words 'I'm stabbed.' I went out again to the landing, and panel again came to me and said let me in to speak to him; I asked him where does the man reside, he then said St. James' Square. I said to him 'you can't get in here, sir, you've made a pretty job of the man, he is unable to speak to you, go into your shop, sir, until, I put you in charge of some one,' he said 'all right, sir,' and walked quietly into his shop. He had at this time the same appearance of quietness and sobriety as before. I got a constable in Frederick Street, John Stewart, I took him into Forrester's and shewed him the body, and then I went with him into panel's shop, and finding him standing beside his counter I said to the constable, 'there is the man.' I had previously mentioned to the constable that I thought it was a case of murder or something like it, the panel then answered 'all right, sir,' I then left the constable in charge of panel and sent another constable to him. On the Friday following, I identified the body of the deceased in the Police Office. When panel made this charge of poisoning, &c. against deceased, I inferred that it was true; this I inferred from his calmness of manner. I looked to see if deceased's dress was at all out of order, as indicating that he had been in bed with panel's wife, but I found it all quite in order.

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Murder.

MARGARET RODGERS.—On the 7th January I was in Frederick Street, in Forrester's shop, a little after 11. I was standing at the counter, deceased came in flinging up his arms, he fell down with his head on his hands, then I stooped down and asked him what was the matter, and he said 'I'm stabbed, God, stabbed.' Allan sent me for a cab and constable. When I came back he was still in the front shop, but when Dr. Hearder came he was taken into the back shop, then I went out again to look for a constable, then I came back, and he was dead by that time. Then I went into panel's shop within the door, I asked him to give me the person's address; he said it was No. 5 St. James' Square or Street, I am not sure which, and he was a working jeweller, he said that twice over. Panel was very white; he said nothing more to me.

Cross-examined.—He was quite sober and quiet, and spoke quite distinctly.

GEORGE JONATHAN HEARDER, M.D.—My brother Thomas keeps a chemist's shop in Frederick Street. On 7th January a boy came asking for spirits of ammonia saying a man was stabbed, I went with the spirits of ammonia to Forrester's shop and found the wounded man in the front shop alive but unconscious, pulse imperceptible. Allan and I carried him into the back shop, and there he died in about 5 minutes. I assisted at the *post mortem* examination, [identifies deceased's clothes.] Immediately after deceased died I went to panel's shop; I saw panel with a constable, he appeared quite calm and collected, he was very pale, to all appearance he was sober. I asked the constable if notice had been sent to the office, he said he could not leave the panel, on which panel offered to go with constable, meaning to the Police Office. The report of the 9th January is subscribed by me, and is a true report.

JOHN STEWART, *Constable.*—I went on the summons of Bruce Allan to Forrester's shop and saw deceased lying on a sofa. Then I went immediately with Allan into panel's shop, I found panel alone inside the counter standing. Allan said, 'there he is,' and went away. I said to panel, what has happened? He said, I gave my working jeweller a prog. I said what with? He said with a dagger. I said where is it? He then took it out from about his person. I made a grasp at it, but he drew back and I missed it; but I grasped it again and got it. I now see it in court; it was in a sheath. Then he began talking about deceased; he called him Paterson—putting poison in his drink, he said he had been doing that for some days in order to get his business and his wife; he talked a good deal about this. He said he caught him on the top of his wife the Monday before; he said he was a blackguard for running after married men's wives, he then said he did not mean to give him much, but just to give him a touch. He asked me several times where Paterson was, if he had gone home, or

where else he was. I did not tell him. Then M'Cabe came, I had been 10 minutes with panel by that time, he on one side of the counter, and I on the other. He walked up and down; he seemed sober, I saw nothing odd about his manner, he seemed quite cool and calm, and spoke quite in the ordinary way. We got a cab as it was very wet, and when panel got into the cab to go to the office, he gave me a shilling to pay the cab; he said I'll go any place you like with you. Made no resistance.

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Cross-examined.—Nothing was said when I took the dagger. I smelt no drink on him. During the ten minutes I was with him, he was walking about inside of the counter, but sometimes standing—not sitting down. He had on a Highland cloak and leggings. I said we would see about the poisoning as well as the rest of it. This I said in order to keep on good terms with him until I got assistance.

To the Court.—I put the dagger in my pocket without unsheathing or examining it, and gave it in the same state to Lieutenant Cowan. Panel said nothing to me about his having been drinking.

ANDREW M'CABE, *Policeman.*—I went to panel's shop on 7th January and found panel and Stewart. Panel asked Stewart if the man was much hurt. I don't remember Stewart giving any answer. We removed him to the Police-office in a cab. I asked him in the cab what he had done to the man. He said he had stabbed him, and he gave as a reason, that Paterson had laid his wife on the sofa and got on top of her. This was not in answer to a question; I think he said this more than once.

Cross-examined.—I smelt no drink on him, I thought he was sober. I remember his saying something about Paterson trying to poison him, but I did not pay much attention to that. He said also something about a lantern, but I don't remember what. He said that Paterson had dropped or shook something over his drink.

WILLIAM COWAN, *Lieutenant of Police.*—I was on duty when panel was brought up on the 7th. I asked his name, &c., and he answered all these questions distinctly. I then asked Dr. Littlejohn in presence of the panel what injuries Paterson had sustained. Dr. Littlejohn explained the injuries, and said Paterson was dead. Panel said nothing on this, and did not seem agitated. The announcement seemed to have no particular effect on him. I then asked him what he had got to say about this. He gave no answer to this; I gave him no time to answer it, I followed it up by asking if Paterson and he were intimate. He said that he had been confined to bed for some-time, that Paterson had been in the habit of coming about him to receive orders about work. That Paterson had intentions upon his life, that he first became aware of this on the night of Monday after Christmas, and that night Paterson was having refreshment in Milne's room, that Paterson took out some mercurial stuff, and filled the room

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with a dense gas, that he felt difficulty in breathing and sleepy, that he saw Paterson take up his little daughter and put paper in her nostrils, that he then endeavoured to look for his wife, and after some time saw her on the other side of the room with Paterson on a sofa. I asked him about Paterson—was he using liberties with her? He said yes, he was on the top of her. He said he could not call out or do anything; that Paterson had put poison in his drink, he had seen him put white silver-like stuff and small black stuff. Then holding up his hands, he said, 'see I am poisoned, my whole body is poisoned.' He said Mrs. Milne had expressed preference for Paterson, saying he was a better man than her husband; that after that night, Paterson kept out of his way and sent his man the messages to him (panel.) That on the morning of the 7th, the man came to ask about some work, and panel said why does not Paterson come himself, tell him to come. Paterson came, and when he entered, panel asked him now what is this about my wife, what have you been doing with her. That Paterson answered with a light derisive laugh. That panel could stand it no longer, and just then gave him the stab. I showed him the dagger which I had got from Stewart, and asked him if that was the weapon he had stabbed him with, he said, 'yes it is.' His manner was calm, he hesitated a good deal as if for want of words to express himself, there was no excitement I could see about him. Within an hour I made notes of the whole of his statement, and I am satisfied the account is correct. The only peculiarity I observed was that he was sour and sullen. His great object seemed to be to explain and account for what he had done. He did not wander to other subjects. He took about 10 or 15 minutes to make the statement. He was standing all the time, and there was nothing restless in his demeanour. I have frequently seen prisoners under *delirium tremens*.

Cross-examined.—Dr. Littlejohn asked panel if he had been drinking. He said no; but when the Doctor put his nose close to the panel's mouth, he (panel) said he had some brandy or brandy and water that morning. He was certainly not under the influence of drink. Dr. Littlejohn was present all the time. I cannot recollect that panel mentioned any of the circumstances more than once. He may have said more than once that Paterson had been poisoning his drink, but it was quite connectedly following out the details of his story. I think the word 'blowing' or 'blown' was used by the panel in connexion with the statement about the gas produced by Paterson. I think he meant me to infer that he could not call out or do anything. He may have used the word quicksilver. I saw panel in his cell same night about 5 o'clock; he was lying quietly, and I did not disturb him. My examination of him was over before 12.30. At 10 next morning he was taken before the magistrate.

HENRY DUNCAN LITTLEJOHN, *Surgeon of Police*.—I found the body

of deceased in Forrester's shop between 12.30 and 1. He was dead, but quite warm. I had the body removed to the Police-office, and informed Lieut. Cowan of the case. Panel was brought into the Lieutenant's room, he was pale, and had appearance of languor and depression, like that produced by recent drinking. His hand was tremulous as he laid it on the bar. I said, 'You have surely been drinking?' He said, 'I have not.' I said, 'Come a little nearer that I may smell you.' I found an unmistakeable odour of spirits. I said again, 'You have been drinking.' Then he admitted he had taken a little brandy and water that morning. I told the Lieutenant that he was not so much under the influence of liquor but that he might be examined. I told the Lieutenant, in panel's presence, that Paterson was dead; this seemed to make no impression on panel. He then, on question, said Paterson was on intimate terms with him, and worked for him, and came much about him. I then asked how this had occurred. He said Paterson had designs on his life, and he had only found it out on the 29th December. That Paterson had attempted to poison him and his family, that on that night Paterson had taken some mercurial stuff from his pocket, and filled the room with vapour or gas, which made him confused and sleepy. He said the children had been attempted to be poisoned by Paterson putting pieces of paper or white stuff in their ears or nostrils, I forget which. He said the vapour occasionally cleared away, and enabled him to see these attempts on his children, and also to see Paterson on the sofa with his wife; that Paterson was taking liberties with her. That he had seen Paterson put white stuff or black stuff into his (panel's) liquor. That Paterson had avoided him since that night, and that on the morning of the 7th, he had sent through Paterson's boy a message that he wanted to see Paterson personally. That on Paterson coming, he taxed him with improprieties with his (panel's) wife, saying, 'what is all this you have been doing with my wife;' that Paterson had made light of it, and laughed derisively, and he imitated the laugh, saying, ha! ha! and then he (panel) struck at him with the knife, which was exhibited; he acknowledged that was the weapon he used. I said, 'Now, Mr Milne, I am a medical man, and I see no marks of poisoning about you;' he said, 'I have been poisoned, Doctor, my whole body is poisoned.' The Lieutenant asked him if Mrs. Milne had given him any cause for jealousy, and the answer was, that Mrs. Milne had said to panel that Paterson was the better man of the two. He appeared perfectly to comprehend every question that was put to him. When he was about to make a strange statement, it struck me that he hesitated a good deal, as if he were pondering his answer. There was nothing else remarkable about his manner. He was not excited, nor restless. I felt his pulse before I allowed his examination, it was 90, quick and weak. I suspected he was about to enter into that state of

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No. 61. *delirium tremens*, from the languor, state of his pulse, the smell of spirits, and the tremulous hand. There were no symptoms of *delirium tremens* on him at the time. I can say, from his state, that he could not have had an attack of *delirium tremens* within 24 hours before I saw him in his cell between 8 and 10; he was lying apparently sleeping; he had been on the ordinary police diet of milk and bread. I saw him next morning about 9.45, to see if he was fit for declaration. He was greatly better. He had cleaned himself, his face had lost its paleness, his hands were no longer tremulous, his pulse was about 75, still weak. I learnt he had passed a quiet night. He knew me again, and said he had passed a comfortable night. I then asked him if he had any more to say about the occurrence of yesterday. He then said, it was entirely by mistake if Paterson was wounded; he was then about to explain further, when I warned him to reserve his examination for the magistrate, but he insisted upon going on to say, that he had the dagger accidentally in his hand, and was aiming some blows at a part at the top of his back stair; that he had sent for Paterson about some work, and hearing him in the shop, had called to him to come in; while he was making these stabs at the part, that Paterson came quickly in, and the dagger accidentally entered Paterson's body. His manner this morning was much more firm and collected; none of the hesitation of the day before. I reported to the Procurator-fiscal that he might be examined. I assisted at the *post mortem* examination. [Proves report].

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Dr. Littlejohn then read the medical report, which minutely described the state of the body and clothing, and attributed death to a wound penetrating the anterior part of the heart—a wound ‘which must have been inflicted with a sharp instrument, and with considerable force.’ The dagger was just such an instrument as would have produced the wound. The dagger bore exactly such traces as would have been expected.

Examination continued.—The dagger shown would produce the wound. There seemed to be marks of blood on the dagger. The wound was necessarily mortal.

Cross-examined.—On the 7th, when I saw him, he was excited, but depressed by drink; he said, on the 7th, before the Lieutenant, that Paterson caused vapours to surge about the room. His hesitation was as if he were attempting to recollect. On the morning of the 8th, before his declaration, he was taken to see Paterson's body, and he showed considerable emotion; he shed tears, and wrung his hands, saying, oh dear! oh dear! has it come to this. It was after that I granted the certificate of the 8th. The certificate was granted be-

cause I had heard from panel's wife that panel had been indulging largely in spirits for some time back, and also in consequence of what I saw on the 7th. Last Wednesday, 4th February, I visited panel in prison. I asked him if he remembered me, he said, he believed I was a doctor, but he could not tell who I was, or when he had seen me. My name was mentioned, and then he recollected all about the times I had previously seen him. He then made similar statements as to the poisoning, and as to his wife as on previous occasions, but gave a different account of the manner in which the wound had been caused. He also stated, that on the Monday night prior to Paterson's death, Paterson had attempted to rob his shop. This was the only new statement he made on this occasion. He said, on that night he had heard a noise outside the shop door, and that he distinctly heard Paterson's voice in a crowd outside, and that he was very apprehensive they were going to rob his shop. I said he could hardly believe that of a person he still believed to be his dearest friend. I said, why did you not forbid Paterson from your house, after all you say he did? I could get no answer to that; he was silent, and hung his head. I asked him how he could believe in such things, and he answered, they were real occurrences. Last Friday I visited him with Dr. Inglis, all he said then was perfectly consistent with what he stated on the previous occasion.

Re-examined.—On Wednesday and Friday last he evidently knew what we were come about, and that his trial was to come on to-day. I saw no symptoms of *delirium tremens* then. He did not then repeat so strongly what he had said about his wife. On the morning of the 8th when he gave the new account of the mode in which the stabbing took place, I said, then your poor wife has had nothing to do with this. He gave a contemptuous smile of acquiescence in my statement. No further allusion was then made to the account he had given before the Lieutenant. I think the wound could not have been caused by an accidental stab such as he described on the 8th. The wound was at a higher part of the body than the height of the post, and the direction of the wound was upwards, not downwards. The post was merely one of the rails of the stair, as he explained to me in the prison.

The same witness examined on matters of skill and opinion.—There was on the 7th something that struck me in his statements. I could not say that the man was fit to be judicially examined; but on seeing him next day I had no hesitation in granting my certificate. I would not have granted that certificate if I had thought him of unsound mind. My apprehension of coming *delirium tremens* was removed. On the 7th he appeared to me to have been drinking hard. I am satisfied he had not been under *delirium tremens* on the 7th, or the day before. On the 7th he seemed to consider he had received sufficient provocation to justify his stabbing Paterson.

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No. 61. *Cross-examined.*—I cannot say whether he believed the truth of what he was saying on the 7th. I was struck with the hesitation of his answers. I account for the clearness and consistency with which panel continues to repeat everything connected with the strange story of the 7th, by the fact of the sudden withdrawal of the stimulus to which he had been accustomed for three or four weeks, and his subjection to ordinary prison discipline. If they were delusions on the 7th, it is not surprising, from the above cause, that he should remember them, and be able to repeat them with great circumstantiality.

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To the Court.—I do not in giving this answer assume or think that he believes them, but only that he remembers them. The symptoms I observed on the 7th were symptoms of recent hard drinking. I did not think them symptoms of a past fit of *delirium tremens*, but they were symptoms of hard drinking which had gone so far as to render a coming fit of *delirium tremens* not improbable. He was not at that time under *delirium tremens*, and the fit never did come on.

THE SOLICITOR-GENERAL here proposed to read the prisoner's declaration, on which

SCOTT, for the panel, objected that when the declaration was emitted the panel was not in his sound and sober senses, and he offered evidence in support of this objection, being generally the same evidence as is to be adduced in supporting the special defence.

The Court admitted the declaration in the meantime, reserving to the Court hereafter, if they shall see cause, to tell the jury that it is not evidence against the panel in respect of the condition of the panel when it was emitted.

The declaration was read accordingly, and was to the effect following :—

I am twenty-nine years of age, a native of Ireland, and reside in South Frederick Street, Edinburgh. I am married. Declares that on Wednesday last, the seventh day of January current, about twelve o'clock, James Paterson, working jeweller, residing in St. James' Square, Edinburgh, came into my shop in South Frederick Street to receive orders from me to execute work for me in connection with my business. He has been in the habit of doing such work for me about two years, and during that time usually called at my shop daily. From our connection in business we became intimate, and went together to the theatre, and played at billiards, and fenced, and played

at skittles together. We occasionally fenced together in my premises in Frederick Street with swords and sticks. When Mr. Paterson called on Wednesday we were on our usual footing of friendship. I was in the back-shop when he came in, and I opened the back-shop door to see who it was that came into the front-shop. The poignard or dagger now shown me, and labelled as relative hereto, which I bought two days previously for the purpose of protecting myself in case of my being attacked when out at night, was then in my hand. I had been manœuvring with it before Mr. Paterson came. When I saw it was he that came in, I held the said poignard or dagger out with my right hand, pointing it to the stair. I did this with the view of letting him see I had got it. I just said, 'Good day, Mr. Paterson,' when I made a thrust with the poignard or dagger at the wood of the stair leading down to the area premises. Immediately before making the thrust I said to Mr. Paterson, 'Take care, stand back;' but instead of standing back, he made a quick turn towards me, and was struck with the said poignard or dagger. He immediately cried out, 'Oh, I am stabbed!' and went down the stair and through my kitchen and front area, reached the street, and afterwards went into the shop of Mr. Forrester, baker, which is next door to mine. I threw down the poignard or dagger on the table in the back-shop, and went down the stair after him to see if there was anything wrong. I immediately went out to the street to look for him, as I did not then know where he had gone to. Miss Forrester, who keeps Mr. Forrester's shop, beckoned to me, and I went to the shop and saw Paterson sitting there and several persons in the shop, but I was refused admittance. I then went into my own shop, and in a few minutes afterwards the police came and apprehended me. I identified the dead body of Mr. Paterson to-day in the Police Office when it was shown to me. The intention of murdering Mr. Paterson, or of injuring him, never entered my head, and the fatal occurrence was entirely accidental. All which I declare to be truth.

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SUSAN HENRY, *Servant to Forrester, Baker*.—There is a door leading from Milne's area to ours; it is usually kept locked. When it is locked there is no access from Milne's area to the street, the stair to the Street goes from one area.

This closed the case for the prosecution.

EXCULPATORY EVIDENCE.

WILLIAM HAMILTON, *Money Order Office, Post Office, Edinburgh*.—On 7th January panel came to me about 11 o'clock with a Dundee order for £2. I cashed the order. He was perfectly sober, but I saw something peculiar—a look, a piercing look. This look seemed to be fixed on me.

No. 61. *Cross-examined for the prosecution.*—I had seen him before cash-
 Alexander ing an order. He presented an order, but could not tell me the name
 Milne. of the remitter, and I would not pay it. He swore and struck the
 High Court counter with a stick, but then remembered the name of the remitter,
 Feb. 9, 10, and then I paid it, but he went away in a great rage.
 11, 1863.

Murder. ROBERT MOODIE.—I am in the employment of Peter Scott & Co.,
 clothiers. I knew panel since November or December 1853. Before
 his marriage I lived in the same lodging with him. I was his best
 man. He was bankrupt in 1860. I visited him down to 29th Decem-
 ber last. There was a marked change on him after his bankruptcy.
 He was a kind, warm-hearted man previously—respectable and well-
 disposed. After that his eyes were different, they had a rolling style
 which I did not like. He used to talk about his business. He would
 put his hands to his head and say I am crushed, or they have crushed
 me. He would do this suddenly. He talked frequently in this way.
 I can't say I have seen him under drink after his bankruptcy. I
 have seen him excited, but I can't say if it was with drink. I have
 seen him take three glasses of whisky and water, but no more. I
 have seen him in Duncan Stewart's public-house in Frederick Street.
 Before bankruptcy he was lively and witty, but after he was dull and
 seedy-looking; he was not inclined to join in conversation. I had
 very little dealing with him in money matters. I became frightened
 at him after his bankruptcy. On the evening of the publication of his
 bankruptcy I met him with a revolver at Duncan Stewart's. I took
 him home. I can't say whether he was drunk. He said 'Do you
 ' want your money?' He was owing me some. On the road home
 he was dull, and said when he got to his house his door was locked,
 and he went to Greliche's Hotel and got some steak. He was looking
 at the revolver there, but I prevented him. I took him home again;
 he was then living in the house above where he was latterly. I
 walked into the drawing-room, and he followed. He took his revolver
 in his hand and stood in an attitude, and cried out something about a
 death. I gave him a calm rebuke, which had the effect of his putting
 away the revolver, and he fell on his knees and gave a groan. I gave
 him a clap on the back, lifted him up, and sat down on a sofa beside
 him. I tried to console him about his bankruptcy. He said, 'Oh,
 ' Moodie, I shall go mad!' He then went to the kitchen and took up
 a carving-knife, and flourished it round his head, and ran round the
 kitchen, then dashed it into the kitchen table and broke the blade.
 Mrs. Milne was going about crying, and she at last got the police. Last
 Christmas night I went to a party at panel's with Brunton and Millar.
 There were also Mr. and Mrs. Kilgour. Milne came from the back
 shop when he came into the front shop. His eyes were rolling, and
 he was very excited and fierce-looking; he made us all stand in a row.
 He had an old sword in his hand; he then asked us to march down to

supper to the tune of the merry masons. He did not seem to be in joke. We went down the back stair—a very narrow stair. He then made us march round the kitchen three or four times. The supper was in the front room below. There was a friend still to come, and when his knock was heard he marched them all up to meet him. It was Paterson, and this was the first time I ever saw him. We then all marched down again. Milne said grace—a strange long piece of nonsense. The company seemed to feel uneasy; I was so. There was not the slightest smile on his face, he was quite in earnest. The company did not speak much. Milne did not drink much. He took the sword up often, and knocked the apples off the table. I was a little alarmed; his eyes were rolling like a madman's. Mr. Kilgour and Millar left first. Kilgour before he went away insisted on panel delivering up the sword, which he did, to his wife. He put a dish on his head when Paterson and I were there alone. I remained after Paterson and Brunton, and we chatted together, Mrs. Milne being of the party also. We had no drink then, and very little during the night, the drink was done early; it was two o'clock when I left. I called next day, and saw panel and Paterson with him, they appeared on very friendly terms. I stood three quarters of an hour; Paterson came away with me, and said Milne is a strange man, and looks dangerous. I saw him again on 29th December at 3.30. P.M., and found Paterson there, Milne appeared in a very excited state, and took a note from Paterson which I had given to Paterson, and I could hardly get it back from him.

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Milne.
High Court.
Feb. 9, 18,
11, 1863.
Murder.

Cross-examined for the Prosecution.—Panel was married in January 1854. I thought him a sober man, he did not become a dissipated man to my knowledge, but he looked dissipated after the bankruptcy; I did not see him take drink, he was a sober man after that till his bankruptcy. I did not see so much of him after that. He was always fond of theatrical gestures and attitudes, spoke in tragic tones, he always did this from the time I first knew him at all times. It was in May 1860 I went to see him in Stewart's public house, he owed me £4, 10s., and I wanted to speak to him about it. It would be after 7 on a Saturday afternoon. I had no doubt at the time he was the worse of liquor. Stewart asked me to take him home, because he had been annoying him. I am not certain what he had to drink at Greliche's. Panel's shop was shut for 10 months, but was opened again two years ago. His wife and he have taken charge of the business all these two years. I don't think he was capable of taking charge of his business; he allowed himself to become bankrupt when he was not so; I think he was very much given to drink during the last two years; I would not doubt but what he was in drink when I went to his party on the 29th December. He knew us all quite well, and did not appear to be aware what he was about, he ate less than the rest of us, I cannot say

No. 61. about his drinking ; I think there were only two decanters of whisky
 Alexander finished, about 2½ bottles only, to six men and two women.
 Milne.

High Court. THOMAS KILGOUR.—*Upholsterer*, Frederick Street. I have known
 Feb. 9, 10, panel some time, I was at his party last Christmas night. When we
 11, 1863. went in, my wife was sent in to Mrs. Milne, and he desired me to stand
 Murder. outside the counter—in a military tone. He looked as if he had been

tasting, he smelt of drink, he seemed excited, and there was a wild roll in his eye which I did not like. In the course of the evening I got the impression there was something else than drink ; he made all the guests as they arrived fall in and march ; we complied with all this just to please our host ; we marched three times round the kitchen, &c. &c. There was a very peculiar grace said by him—nonsensical ; he seemed very serious about this, and I felt very uncomfortable, it made my blood run cold to hear the name of the Almighty coupled with all the ordinary nonsense of a fairy bower ; I began to doubt whether he was in his right mind. He cut the haggis in a very odd way, cutting it all to pieces. There was not much conversation ; there was a damper on the company, produced by the strange grace. I was sitting on panel's right hand, he caught me by the hair of the head, I said, 'drop that,' he said, 'cry murder then,' and I did so, and he let me go ; I thought the incident was mere fun. In the course of the evening he brought out his sword and fenced with Paterson, Paterson using a stick, I interfered and insisted on his giving up the sword, which he did, to his wife, who took it away, this added to my uncomfortable feelings. Paterson and I had occasion to go out to the back door, I said Milne is a strange man, he said 'he is, but not a bad fellow either,' he said, he has been doing very well for Milne but for the grace, which I can't get over at all. At one time he cut an apple on a plate on the table in two with his sword ; this seemed good fun to him, but we did not like it. After the fencing scene my wife and I left, I could not say he was drunk, not what I call drunk, but he was under the influence of drink to some extent. I don't think all the drink he had in my company would account for his conduct ; I thought there was something wrong, he was much the same throughout the evening ; he drank little ; I had only one tumbler of toddy, I can't say how many he had. I saw him again on the 3d January, he was in bed and his eyes were quite glared and wild. Paterson and the panel were very friendly ; panel spoke kindly of Paterson on the 3d January, and made no complaint that Paterson was not dealing fairly with him.

Cross-examined for the Prosecution.—There were few songs at the Christmas party. Panel sung one, the first ; all the party were quite sober except Panel.

The Court adjourned at 7.10. P.M.

DR. CHARLES SIDEY.—I have been a Surgeon for 40 years. I have attended panel ; about twelve months ago for the first time. He

was threatened with dropsy and disease of liver and kidneys. I did not attend him again till 5th January 1863; I was sent for, I went into the back room behind the shop where he was lying; I asked him what was the matter, he said he felt unwell, he suspected poison had been put into the water, he did not say whom he suspected. I then told him he had been drinking. He was quite calm, pulse quick, no symptoms of fever or delirium. I prescribed a camphor mixture with tartar emetic in it. He asked me to come back next day, but I declined, saying he was unworthy of any attendance. I said this because he did not when I attended him before do anything he was bid. Mrs. Milne was there and asked me to come back, I said I would come back if I could, but was much engaged. When he said the water was poisoned, I said he could not suppose his wife or children had done it, and he ought to turn his suspicions to himself, that he was I thought the person who was poisoning his own water, I meant he had been mixing too much drink with it. I was not struck with this charge of poisoning, I have heard the same thing in other cases before I was there 10 minutes; I did not see him again till yesterday.

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Alexander
Milne.
High Court.
Feb. 9, 10,
11. 1863.
Murder.

Cross-examined for the Prosecution.—I had no doubt what was the matter with him on the 5th, he had been drinking hard. I had advised him against it when I attended him before, he promised to give it up. On the 5th I charged him with drinking as soon as I saw him; I told him if he continued his course he would go downwards, and probably much sooner than he expected; he said he had not been drinking since Christmas; I asked his wife if it was not true that he had been drinking, she said, 'yes.' I think he made the statement about poisoning before I charged him with drinking; he seemed quite intelligent.

Re-examined.—On the 5th January his hand was firm, his tongue was clean, no symptoms of fever, and nothing particular about his eye. I proceeded a good deal on his past history in charging him with drinking. There was no smell of drink and nothing the matter with him that I saw, but he had the appearance of a person who had been drinking, he was pale and a little depressed.

To the Court.—There was no appearance of insanity on the 5th, nothing to lead me to suspect such a thing.

WILLIAM HILL, Shopman to Gardner and Ainslie, Druggists.—One day in the beginning of the year I remember a prescription coming from Dr. Sidey, there was stamped on the paper 'A. Milne, 'artist in hair'; I can't tell who brought it.

SAMUEL BAIRD, in the employment of Thomas Hearder, Chemist.—I remember in the beginning of the year a prescription coming from Dr. Sidey, I mind that there was camphor, I never saw the prescription. It was a little girl who brought it, a girl like the size of panel's daughter.

No. 61. JAMES LAING, *Light Porter, 7 Carnegie Street.*—I have known Alexander Milne. panel 5 years. I put on and took off his shutters for the last 4 years. His first shop was in George Street. On the evening of 5th January at 7 High Court. I put on the shutters, I saw panel then at the door, he came forward Feb. 9, 10, from the back shop, he was rolled up in a Highland cloak, his boots 11, 1863. on, but nothing on his head; he said to me 'hush don't you see them,' Murder. I said, 'who, sir,' he said, 'don't you see the robbers, they are planning to break into the shop, watch them, watch them,' he did not point to anybody, but looked out into the street; I looked but there was nobody passing; he did not say who the robbers were. He said also they had been trying to poison himself, and his wife and children, and we have taken a little of it, but it had no effect. The shutters are kept in the area, I went down for them; he then said 'watch them.' He stood at the door while I was down; I put on the shutters, then he locked the door. I smelt no drink about him. I had not any drink that day. I was struck with panel's look that night; he was very wild and strange-looking. I never heard him speak about robbers or poisoning before that. I took off the shutters next morning, (Tuesday.) There was great fumbling inside to get the door opened; Mrs. Milne came to open the door, and both she and panel were there when the door opened; panel had on just his trousers, shirt, and boots, it was 9.30. A.M. Panel said they had been there, but had not got in; Mrs. Milne said nothing. Nothing more passed. In the evening of the same day Mrs. Milne showed me an iron bar which had been made to go across the door; I never saw it before. Mrs. Milne remarked, 'that will surely please him now.' I never saw panel in such a state as on the evening of the 5th, and morning of the 6th. I put on the shutters on the evening of 31st December. I saw Milne that night; he looked well enough that night, he appeared to be sober, nothing strange about him.

Cross-examined.—I have seen him a little hearty about Christmas time, but nothing more, not the worse of drink, as far as I know he was not drinking hard. He was merry and joking when I saw him, never solemn or serious. He was sober on the 5th when I saw him. I had heard that he had been drinking hard, and I connected his strange wild look that night with what I had heard; I did not think of anything else. He was moody and silent sometimes during all my acquaintance with him, often sulky and down-looking. I never saw him speak tragically, or throw himself into attitudes. Though I heard he had been drinking hard, he might have been living soberly enough for aught that I saw, except for the wild look. He had the same wild look on the morning of the 6th. I asked him no questions that morning; he said they have been here, but have not got in, that was all he said, and he said it very quietly and solemnly. He had formerly a mild eye, now it was glaring.

ALEXANDER FORREST, *Blacksmith, Rose Street*.—On 6th January panel came to my shop between 11 and 12. He said he wanted a strong bar for the back of his shop door. He said he suspected his shop had been attempted the night before. He was sober and serious. He asked me to go and take the measure; I went between 11 and 12. I smelt no drink. He was five minutes in my shop; I was ten minutes measuring for the bar. Deceased came up the steps while I was there, I knew him by sight. Panel was there; I said this gentleman may come and give his opinion also. Panel said to deceased you won't enter this door; he repeated it more than once. He said further, if you come in here you must come through the door. Deceased gave a smile and left. All this took place outside the door. Panel said to me after deceased left, I am suspicious of him and another. He did not say who the other was. He then told me to put on the bar the best way I could; he had some consultation with me about how it should be put on. I made the bar, and went over to put it on same day about 4 p.m. Panel was there, and after it was put on I called him to look at it. He said, I think it will do. He then asked me into the back shop to take a glass of spirits; I took some; I did not observe him take any. I was not three minutes in the back shop. Panel came to the door and said, 'I have my suspicions, and there is a spirit I use by which I can see other people when they can't see, pointing his finger upwards.' I saw deceased immediately after leaving panel's in the morning, it was about 12 o'clock, and I went to a public-house with him. I said how is it that Milne and you are not so friendly as you were. He said, I don't know. I said he seems to be suspicious of you and another attempting to break into his shop last night. Deceased said 'that would be the last of my thoughts.' He said the man has been in *delirium tremens* ever since Christmas or New Year's day. I forget which he said, I think Christmas. I told him about the bar being ordered. I said I did not know if I could get it on that day. He said, 'Oh I would do it if you can to please him.'

No. 61.
Alexander
Milne.

High Court.
Feb. 9, 10,
11, 1863.
Murder.

Cross-examined for the Prosecution.—Panel was quite quiet and cool both times I saw him on the 6th, but there was a little stress on the words when he spoke about the spirit—just a little emphasis. I did not understand what he said about the spirit. With that exception he spoke in his usual way. He gave his orders quite distinctly and intelligently. There were marks of a dirty shoe pressing against the door from the outside, no other marks of violence. It is a double door with bolt above and below. I think the bar he ordered was a necessary precaution. I had known him two years, and there was nothing different about him that day, except his talking about the spirit. I made panel a present of a sword about four months ago; I showed it him in my shop, and he asked me for it. I did not do it at the time,

No. 61. but I took it to him and gave it him afterwards. He seemed to covet
 Alexander it very much. Panel took it in his hand and made a flourish with it
 Milne. round his head. There was nothing odd in his ordering this bar, nor
 High Court. in the manner in which he did it.
 Feb. 9, 10, 11, 1863. *To the Court.*—This is just the sort of door that requires such a bar
 Murder. for safety.

JANET FORRESTER, *Baker, next door to Panel.*—I have known him for two years; he was always civil and obliging. I once saw him the worse of drink in summer 1861. He was very riotous, and was taken to the Police Office. On 6th January between 11 and 12 panel came into my shop and asked if I had heard a noise at his door the night before. I said I had heard the noise, but did not look out. I did hear a noise the night before, a kicking either outside or inside of Milne's door about 9 at night. I did not think it was robbers, I thought nothing about it. Panel said his shop was going to be broken into. I asked what made him think so. He said the spirit told him so, putting his hand to his brow. No more passed. I observed no smell of drink, but the counter was between us. He did not seem under the influence of drink, he seemed quite serious. I never heard anything against the character of panel's wife; I believe her to be respectable.

Cross-examined for the Prosecution.—There was nothing extraordinary in his appearance or manner on the 6th. I was in the back room when I heard the noise at panel's door on the evening of the 5th. It struck me as an unusual thing.

George Smith, Son of Mr. Smith, of Smith & Philpot, Auctioneers.—On 6th January panel came into our saloon about 12 with a parcel of jewellery. He wished to put it into our safe because robbers had been at his door the night before. I put it into the safe. My father, the cashier, Rutherford, and Mr. Philpot's son were present. We did not believe the story about robbers, we thought it all a delusion. My father asked him where were the police? Panel answered, if I came out they would kill me. He said he knew they would come back again that night, and he was going to get iron bars for his door. We thought all this a delusion. We took the jewellery to please him, and get him away. I made an inventory, and gave him a copy. He was quite serious; we tried to put it out of his head. I did not think he was in his right mind. Next morning about 10 he came back to our premises; he had on a Highland cloak, leggings, and a Balmoral bonnet. I was reading a newspaper; he sat down beside me; I smelt no drink. He said his wife and the man had been attempting to poison him the night before; he said he wished some of us—my father—to come over and look at his stock, as he wished to dispose of it. I asked how they had tried to poison him. He said he had caught the man shaking a powder into the tumbler of water he was going to drink.

Nothing more passed. I thought this story 'all bosh.' Panel left about 10.15; he was not with me above 5 or 10 minutes. My father came in about 11.

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Cross-examined for the Prosecution.—Panel has been going about our place 18 months. On the 6th he spoke differently from before—more excited in manner. Once, about the end of November, he brought over a brooch, and wanted £25 advanced on it, which we would not give him, and he came down to £10, £7, and £3, but we would have nothing to do with it. He then threw the brooch violently, and was in a great rage. There was a strong smell of drink, and he was excited with drink. I never saw him violent before that. He was not generally odd in his behaviour. I attribute his excitement on the 6th January to drink; I never thought of any other cause. On the Wednesday, also, I attributed all his story to the effects of drink. He was not violent either on the 6th or 7th. It was in a low tone he told me of his wife and the man trying to poison him, he did not seem to be frightened. He connected this story with his wish to dispose of his stock. I thought at the time that he believed the stories he was telling me.

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JOHN SMITH, of *Smith & Philpot, Auctioneers, George Street.*—On 6th January panel came to our rooms a little after 12. He had a parcel under his arm; he said he wanted to speak to me; he said he had brought part of his stock, which he wished me to lock up in our safe for a day or two. He said robbers had been at his shop door the night before wishing to break in. I said I thought that was strange in Edinburgh, and why did he not apply to the police. He said, you know I could not come out, if I had come out I should have been killed. He said he knew they would be back to-night again, and he was going to get a smith to make a bar for the shop door. He said he knew he would be both robbed and murdered. I tried to persuade him out of it but did not succeed. I kept his things for him. I thought there was something very strange in his eyes, he seemed excited a good deal. My impression was that he was in *delirium*, or something similar. I had no doubt he was wrong in his mind somehow at the time. On Wednesday morning I came in about 10. A statement was made to me about Milne by one of my people, in consequence of which I gave directions to them about him. I got a message from panel, through my son, asking me to go over to his shop and see him. I did not go, for I did not think it was safe to go near him.

Cross-examined.—I have known panel by sight for 5 or 6 years. He has not been a sober man; I have seen him frequently the worse of liquor at all times of the day; he was much given to drinking. He had always a curious excited look for the last three years both when drunk and sober. On the 6th I thought there was something seriously

No. 61. wrong with him, probably drink had a good deal to do with it. He
 Alexander looked very knocked-up-like on the Tuesday, as if he had not been in
 Milne. bed for two or three nights; he was worse in every respect than when
 High Court. I had previously seen him. I had not seen him for three weeks
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Murder. *Re-examined.*—He had not the appearance of having been drinking much that morning; he handed over the things to us in a real business-like way.

WILLIAM HENDERSON, *Accountant British Linen Co.'s Bank.*—On 7th January panel came to cash a cheque rather before 11, for £2, 2s. on our branch at Hawick. I did not know him, and I asked his address, he said, A. Milne and Co., Frederick Street; the cheque was so endorsed.

Cross-examined.—When I spoke to him he smelt strongly of drink, and was a little excited in manner.

JOHN WIGHT, *Prisoner in Edinburgh Prison.*—I was a prisoner there on the 8th January, the sub-keeper asked me to go into the cell beside the panel. I went on the morning of the 9th, because there was something peculiar in his condition. Panel was very quiet all day; I had very little conversation with him; we went to bed a quarter before 8. The gas was put out, and we were lying quite quiet; we were in separate beds; he got up and came to my bed, felt all over my body, did not say anything, then went back to his own bed; then got up again, and ran to the door, and cried 'Murder, Oh my wife and children!' I lay still for a little, then got up and got hold of him; he was still at the door, calling out 'Murder, Oh my wife!' and 'they are murdering my wife and children!' He was all shaking when I got hold of him, and frightened like. I tried to soothe him, but he carried on the same way. The night watchman, M'Kay, came down with a light and opened the door, Milne still cried out to him the same words. He caught hold of M'Kay, and seemed to cling to him, still crying out the same thing. Panel was then taken away, and I saw no more of him till next morning at 6.30, when he was brought back perfectly quiet. Another prisoner, Martin, was put in with us that day, and we three have been together ever since. The following night he got up and began to gesticulate with his hands before his eyes, and his eyes rolling; we got water and bathed him, and he sat down, and said he wanted morphia, and began to cry; we then got him quieted. I thought from all this the man was not right in his mind. I was a little frightened for him at first. The first week he told me some policeman came and knocked at his shop door, then he said they were not policemen, but Paterson and Kilgour. I said that was nonsense—he said he knew Paterson's voice. He said Paterson and Kilgour were dressed as policemen—he said they wanted to break into the shop—he said Paterson was poisoning him, (this would be on

Thursday or Friday of the first week), that he had given him a poisoned cigar, and that he used to put stuff into his drink—poison. That Paterson put something in his mouth and chewed it, and blew a gas out of his mouth all through the house. He said the skin was coming off his hands and his feet in consequence of the poison. I looked at his hands and feet, and it was nothing but the outer skin scaling off for want of work. All this occurred in the first and second weeks after he came to prison. He said the vapour that Paterson made affected his eyes, and coloured his face and his wife's; and then he said Paterson gave his wife a signal, and she went away down stairs, Paterson followed, and that Paterson had then had connexion with her; he always hammered and spoke about it, and we never paid much attention to what he was saying.

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The witness was here removed, and

The LORD JUSTICE-CLERK, addressing the prisoner's counsel, said, that the evidence they were now leading was of such a nature as to bring down the prisoner's insanity to the present time, and if this was proved, the prisoner could not be discharged, but the Court would have to give an order for the disposal of his person under the provisions of the Lunacy Act, 20th and 21st Vict. c. 81.

SCOTT said that at the time the crime was committed the prisoner was labouring under insane delusions, and these had continued up to Friday last.

Witness recalled—

Panel slept very little the first week after 12 o'clock.

Cross-examined.—I have been in the same cell with panel from 9th January up to this day. There is no difference in him, he is the same now as he was at the beginning; the first night he had been asleep for three hours before he got up. He got up quietly at first, and was quite silent while he was feeling over my body. He sat down on his bed, and was there a couple of minutes before he began to cry out. He was quite quiet the next day; his conduct was correct. I asked him what he thought of the way he had carried on last night? He said it was just the dream about his wife and children. He said he had dreamt that some person was then murdering his wife and children. Next night he was sleeping quiet the first part of the night, before he got up, and began with his hands clearing away the mist before his eyes, he was not asleep, for his eyes were open. I did not ask him about that the next day; I thought he had been dreaming then. He spoke to me during the day of the murder of his wife and children, and of the poisoning by Paterson as being dreams, that he thought he

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saw these in dreams. He did not speak of the vapour scene as a thing he had seen in a dream. He said he had seen this quite distinctly when awake. On the Saturday of the first week, he told me he was there for murder, but he did not say who was murdered, and I did not ask him. I did on Monday or Tuesday following, and he said it was Paterson, but that he was not murdered, but the police had been keeping him locked up out of sight. He said that after he was condemned, Paterson would come and marry his wife, and get the business to himself. I said that was nonsense, but he said it was truth. He said he was standing in the shop playing with a dagger he had bought that morning when Paterson's man came, and he told the man to send Paterson as usual; that he was still playing with the dagger when Paterson came in, that he told him to stand back, but Paterson rushed forward, and the dagger touched him in the coat, and Paterson rushed down a back stair; that he looked at the dagger, and saw that there was no blood on it, and he put it in its sheath, and then followed Paterson, and saw him climbing out of the area; that he then came up stairs, and out at the shop door, and saw Paterson sitting in the baker's shop, and then a policeman came. Then he said he had seen Paterson's corpse lying in the Police-office next day; he was quite firm in stating this. He then commenced dancing and singing. Martin was there and heard all this. He then said that the stab was an accident; that he was his friend, and had always liked him well. This he said on the Tuesday, and since then frequently. He never gave me any other account of the stab—never said anything against Paterson; and never said he had ill-will at him, or as if Paterson deserved to be punished for what he had done to him. He always spoke of the stab as an accident. It was on the Tuesday (following the Monday on which he told me all about the stabbing), that he first told me about the vapour, and Paterson having connexion with his wife. It was not in connexion with the stabbing that he stated this. He has been frequently dark respecting the same story down to the present time, and he always calls him his friend. He never spoke of Paterson to me as a man who had injured him, except in the particular story of the vapour, and what followed on it; and he frequently still repeats that Paterson is not killed, and is kept locked up by the police; but he has never again stated that he saw Paterson's corpse in the Police-office. I have not recalled that to him. He did not speak foolishly on other subjects, nor does he. He tells us this story every day, suddenly breaking out with it, and walking about while he tells it, and then when he finishes it, falls to dance and sing.

To the Court.—He told the same thing to the under-keeper of the prison, Neilson, as he told to me and Martin. Neilson visits us every morning before 7, and panel has frequently repeated all these stories to Mr. Neilson. I am under a charge of house-breaking.

GEORGE MARTIN, *Prisoner in the Prison of Edinburgh*.—On the 10th of January morning I was put into same cell with panel. He was quite quiet that day—he looked strange. That night he started in his sleep, and raised out of bed, and cried for morphia, and tried like to clear mist from his eyes. I got water and bathed his forehead and hands; he was quite awake; his eyes were rolling in his head; continued 5 minutes this way. He said he was lying in his bed wide-awake, and saw his wife and family murdered. I said it was a dream, he said no, it was not a dream; he wept much after this, and then lay down and slept. About 3 a.m. I saw him lying on his bed reading; I think it was a Bible. On Monday morning after Neilson came, he told him what had occurred on the Saturday night; he spoke of it as a reality and not a dream, and he wanted men sent to guard his shop to prevent its being robbed. He said his skin came off his hands and feet from being poisoned. I tried to persuade him out of it, but he told me I was a fool. He spoke of Paterson, said he gave him a poisoned cigar the morning after Christmas. He said he felt a mist over his eyes after it, and vapours. He said he saw Paterson's body in the Police-office, but that he thought he was shamming, and that he would rise to take away his business and his wife. He said he had seen Paterson in the cell between 11 and 12 o'clock at night, and he had told him he was in business on the south side, and that he was drawing £5000 a-day, and that he meant to take away Milne's name altogether—he did not say he dreamt it. It was last Monday morning he told me this. I spoke to him about his trial, but he did not seem to take notice of it, or to care about it. He was more interested about mine.

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Cross-examined for the Prosecution.—He said he knew he was to be tried for the murder of Paterson—he said this last Thursday. He was serious in saying that Paterson was in the cell last Thursday week. When he spoke of a poisoned cigar, he said he had a banquet in his house on Christmas night, and he mentioned the names of the company, and said they had a grand march up through his jeweller's shop and down again; he said his room wall was all hung with holly leaves; that he showed the company some swordsmanship, and was cutting apples through the middle off a wine glass, but he gave up the sword at the request of the company, not to offend them; that he sung a song that night; that next day he was lying badly, and Paterson came to his house to see how he was, and gave him a cigar out of his case, and took a cigar out of his pocket, not out of the case, for himself, that after he smoked it, he saw vapours, and that he got some poison among his drink; that Paterson called again on Saturday following, and put poison in his drink. That on Monday following he was lying in bed, and there was a mist round his eyes, and he saw Paterson having connexion with his wife; that next night, the shop was at-

No. 61. tempted to be broken into, and he heard the voices of Paterson and
 Alexander Kilgour at the door; that he asked who was at the door, they said,
 Milne. 'the Police;' that he asked what they wanted, and he saw there was
 High Court. a crowd round his door; that he told the police to keep the crowd
 Feb. 9, 10, quiet outside; that same night he told his wife he was dying, but his
 11, 1863. wife took no notice; that next morning he rose and went to the Post-
 Murder. office, and then to the Bank, and from that went and bought a dagger
 to protect himself from garrotting, and from shop-breaking; that Pa-
 terson's man came for work, but he said, why did not Paterson come
 himself; that Paterson came in by a small door, and panel having the
 dagger in his hand playing with it, and Paterson had run forward on
 the dagger, but he did not think he was stabbed, but he ran down
 stairs, and got out and over the area rails; that he found no blood on
 the dagger; that he gave it to the policeman; that he was taken to the
 office, and he asked where Paterson was, and some one told him Pater-
 son was gone home. That he was brought up for murder of Paterson
 next morning, and he was quite astonished; that he was shown the
 body of Paterson, but he did not believe he was dead, but that he was
 just scheming to get his wife and his business. He told me that Paterson
 and Kilgour had taken the jewellery of his house to the Music Hall,
 and had made money by exhibiting it. He said if Paterson was
 stabbed it was an accident. He said he never stabbed him; he spoke
 as if he liked him, and continued to like him. In telling these stories,
 he did not seem to know what he was saying—his mind seemed to be
 wandering. He told me this story very often, and bits of it at a time.
 He told it the same way always, but not always the whole story. He
 never connected the stabbing of Paterson with his poisoning him and
 debauching his wife. He said Paterson was injuring him, but still he
 spoke well of him. He is just the same now as ever, and telling bits
 of the same story from time to time.

To the Court.—Sometimes he knows that Paterson is dead, and
 says 'poor Paterson;' at other times he can't believe it.

HUGH M'KAY, *Warder in Calton Prison, Edinburgh.*—Panel came
 on the 8th January. Wight was put into a cell with him on the 9th.
 On the evening of 9th I heard great shouting of 'murder' and kicking
 at the door of panel's cell. I went down and opened the door; panel
 was clinging to Wight and shouting 'murder.' As soon as he saw
 me he clung to my shoulders, and said 'Oh, will you protect my wife
 'and children.' This was about midnight. Wight appeared very
 much frightened, and was crying out too. Panel told me he had been
 visited by three men the previous day, who said they were doctors,
 but they were conspirators, and there was a conspiracy on foot to
 murder his wife and children. I pacified him by removing him to a
 padded cell, and telling him I would get the police to protect his wife
 and children. He was quite awake, he went quietly to the padded

room. He sat down on a stool, and remained same hours without sleeping. I sat on opposite side of room. He seemed in great distress both of body and mind. His eyes had a fixed stare, and were directed at me. About four he stood up and examined a button of my coat, and said 'My God, I know where I am, you are the jailor!' He examined the button for several seconds, he drew his hand across his forehead, he then went back to his stool. After he had sat for about an hour he got up and said 'My name is Norval, on the Grampian hills.' About 6 a.m. I gave him in charge to another warder. In the course of the morning he asked me if his wife and family were safe. I told him to quiet him that I had put a guard on his house, and that they were safe.

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Cross-examined for the Prosecution.—I had no conversation with him after this, but when I saw him he seemed composed and settled. He seemed to me that night and morning to be in an early stage of *delirium tremens*. I have often seen such cases.

To the COURT.—I reported to John Livingstone, the head warder, what state he was in. He was not treated for *delirium tremens*.

The general evidence for the defence being closed, and the medical evidence being about to be opened—

The LORD JUSTICE-CLERK said he might take the opportunity of telling the jury that under a recent Act¹ it was competent for them at any stage to interpose, when they found that sufficient evidence had been adduced to prove that the prisoner was presently insane. He did not now state this as indicating any opinion on the part of the Court whether they ought or ought not to interpose, but simply to inform them

¹ The Act 20th and 21st Vict. c. 81, provides, sec. 87—'That where any person charged upon any indictment or criminal libel with the commission of any crime, shall be found insane, so that such person cannot be tried upon such indictment; or if, upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment or criminal libel to be insane, the Court before whom such person shall be brought to be tried as aforesaid shall direct a finding to that effect to be recorded, and thereupon such Court shall order such person to be kept in strict custody until her Majesty's pleasure shall be known; and it shall be lawful for her Majesty to give such order for the safe custody of such person so found insane during her pleasure, in such place and in such manner as to her Majesty shall seem fit.'

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that they had the power to do so. If they did not see cause to exercise it, the trial would of course go on to its natural conclusion.

THE LORD ADVOCATE said it was, however, for the jury to consider whether, before they had heard the whole evidence, it was desirable they should interpose.

THE LORD JUSTICE-CLERK said he was only stating what the Act enabled the jury to do.

DR. JAMES SIMSON, *Surgeon of Prison of Edinburgh*.—On the 9th January I was desired by the Procurator-Fiscal to go with Professor Christison and any other medical gentleman well acquainted with mental disease to visit the prisoner. The object was to ascertain the state of his mind. I had seen him on the morning before at 11. I went with Christison and Smith at 3.30 p.m. I again went with Smith on the 11th or 12th, and with Christison on the 13th. On the morning of the 9th panel's pulse was small and quickish, tongue loaded. He was not under *delirium tremens*. His eyes had a dreamy, heavy appearance. He complained of pain in the fore part of the head. On the 9th when I visited with Christison and Smith I asked him what he had been doing on Christmas Day, and I got a description of all his proceedings down to his being lodged in prison. He said that on Friday the 26th Paterson gave him a poisoned cigar. On Saturday the 27th Paterson produced vapour which confused and blinded panel—vapour produced from substance taken out of Paterson's pocket, from which he blew out vapour. He told me of an attempt to rob his shop on January 5th. He knew there was to be a robbery, for he had seen on a paper on his own wall, 'robbery to-night.' On the 29th he saw through the vapour Paterson and his wife on the sofa, and that the vapour prevented him from rising. He said he sent for Dr. Sidey on the 5th, who ordered camphor mixture. That Paterson came in, took cork out of the bottle, he suspected he had put something into it, and sent for another bottle. I did not think panel was feigning insanity. I have had various interviews with him, which confirms this impression, I tried to carry him further with his stories, but he stuck consistently to one story. His health has improved in prison. If he was not feigning he was labouring under delusions, and therefore is insane. He varies a good deal, and is better and worse in his mental health. Last Friday and Saturday he was not so well in mental health.

Cross-examined for the Prosecution.—There was nothing wrong with his mental health except the presence of delusions. He began to doubt sometimes in beginning of last week whether his delusion was a fact. He had been reading "M'Nish's Anatomy of Drunkenness," and he found stories of such delusions proceeding from drink which made him doubt about his own. His first delusion was the poisoning

with cigar. (2.) Vapours. (3.) The poisoning his drink by Paterson. (4.) He said on Christmas night he heard Paterson, and Kilgour, and Moodie, making a conspiracy to break into his shop. (5.) Paterson's designs on his wife by the use of a vapour which alienated her affections from him and fixed them on Paterson. He told us all these things on the 9th. We did not find any connection between any of the delusions and the act of murder. He said the act was accidental merely. He never varied from that. I have never traced any connection between the murder and any delusion in his mind. I never knew or heard of a case in which homicide committed under an insane delusion was first admitted and then denied by the lunatic. A monomaniac does not attribute to accident what he has done under delusion.

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To the Court.—I never saw symptoms of *delirium tremens* in panel. The facts spoken to by the warder, M'Kay, were not like symptoms of *delirium tremens*. The events of the night of 9th January may be explained either as the result of a dream, or as the exhibition of one of his delusions. These facts were reported me the day after. I saw him that morning; he was a little sleepy, as if he had not slept well, that was the only difference from the day before. I did not think what he suffered on night of 9th was caused by withdrawal of stimulants to which he had been accustomed. My opinion is, that *delirium tremens* is not produced by withdrawal of stimulants, but by the antecedent poison of alcohol. Q. What is your opinion of his present mental condition? A. He is insane still in respect of these delusions. He is now as insane as during any time he has been under my charge.

DR. JOHN SMITH, *Visiting Physician of Saughton Lunatic Asylum.*—I visited the panel with Simson and Christison on 9th, 12th, and 13th January to discover his present state of mind. My opinion was that he was under certain impressions which I believed to be delusions, and which would on investigation be proved to be delusions. I have no doubt he believed what he said to be true. My impression was that he was not feigning. I thought this from the readiness and simplicity with which he answered questions, and from his being calm and composed throughout. My opinion is that he is insane, and from the evidence I have heard my impression is that the state of his mind was unsound at the date of the act of homicide charged. My impression has been the same throughout. He is a man of fair intelligence. I found nothing wrong with him except the delusions. I tried to reason with him about the conspiracy to rob his shop, the poisoning of his drink, and his wife's infidelity. I asked him about the murder of Paterson. I found that act to be connected with the delusion of the conspiracy, and the delusion of the poisoning. I thought the act of homicide was committed to get rid of the conspirator, the poisoner, and the seducer of his wife. I formed this opinion from what came out in the whole course of the conversation. He gave me by his conver-

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 Alexander of the person who had so injured him. He said it was an accident.
 Milne. I thought that in saying that he was saying what he did not believe
 High Court. to be true. He never said anything about the act of homicide except
 Feb. 9, 10, that it was an accident. He might murder the man under the influence
 11, 1863. of an insane delusion and afterwards say it was an accident. I am
 Murder. not acquainted with any case of murder in which that occurred. I
 have known an act done by a monomaniac under the influence of his
 delusion, and then denied by him. A monomaniac may, immediately
 after an act committed under the delusion, feel contrition, and try to
 extenuate the act. He expressed doubts as to whether Paterson was
 dead. He said he saw the dead body, but it was so like life he did
 not think he was really dead. I don't think he believed that. I
 think he was trying to impose on us in saying that. I also thought he
 was trying to impose on us when he gave a long account of how it had
 occurred by accident. He appeared in bad health from drinking.

Re-examined—His intentionally telling a lie in his declaration does
 not exclude the idea that on the previous day he was of unsound mind.

Question, Is it not a possible condition of the mind in monomania
 that the patient might be well aware of the nature of the crime, and
 that he would suffer for it, and yet might feel irresistibly impelled to
 commit the crime?

The LORD JUSTICE-CLERK.—If all the physicians in
 Europe were to state that, I would tell the jury that
 they must not believe it, or act on it.

Witness answered the question in the negative.

To the COURT.—The panel was as much insane the last day I saw
 him as the first.

ROBERT CHRISTISON, M.D.—Panel was perfectly intelligent on all
 points except as to certain impressions he stated he entertained for
 some days before the act for which he is now here. They appeared
 to me to be delusions, but which at the same time it would require the
 evidence of others to prove to my satisfaction that they were delusions.
 I should require to be satisfied whether the things he said he believed
 had really taken place or not, and also whether he had spoken of them
 previous to the act. He seemed to believe that these occurrences took
 place. If these were delusions, he was insane when he was under them.
 He was not under the influence of his delusions when I saw him. He
 only recalled them as impressions formerly existing. I did not observe
 any indication of feigning insanity while under examination. He had
 the general dreamy expression of persons describing such delusions—
 a peculiar expression which persons have, even when sane, at the time
 when they recall and recount such delusions. Persons afflicted with
 delusions are sometimes intelligent enough to plan things to get off

from punishment. I cannot say that the panel appears to have been labouring under an alienation of reason at the time so that he was doing no wrong.

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To the COURT.—When I saw panel I think he then believed that Paterson had produced the vapour. He did not think he was then subjected to such practices, there was therefore no present delusion of the senses. But his recollection and belief of the former supposed occurrences was an existing delusion of the understanding. It is a favourable state towards recovery where the delusions don't recur, but it is not a recovery till the patient comes to disbelieve what he formerly believed. In feigned insanity it is much easier to feign a past delirium than a presently existing one. There is no appearance of *delirium tremens* in the case.

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This closed the evidence for the defence, and the Court then adjourned till the day following.

The SOLICITOR-GENERAL addressed the jury for the Crown. He said there were four, or rather five questions for the consideration of the jury. The first was, was the deceased James Paterson killed on the occasion libelled by being stabbed with a dagger? On that point he thought the evidence too clear and conclusive to call for any observation. The second question was equally clear with the first—namely, was the prisoner the person who so killed him, and was the wound inflicted by the prisoner intentionally, and not by accident? He put intentionally as opposed to accident, as apart from the question whether the stab was inflicted for the purpose of killing him, or of merely giving him a touch. The third question was perhaps deserving of more consideration—was the deed done under such circumstances as to amount to murder, or was it an offence of a lower description? and he expressed this question apart altogether from the defence of insanity, which must be separately considered. The fourth question, and the most important in the case, was this—was the prisoner insane at the time he committed the act? There was a fifth question, which in its own nature was really the first in the case, for an answer to it in one way would supersede the necessity of answering all the others—namely, was the prisoner insane now? The

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case which his counsel had made for him—and he could not doubt their judgment—after anxious consideration and inquiry, was that he is insane now. If he is insane now, he is in no position to defend himself from the charge of murder ; he is in no position to be tried for murder ; and he neither could be condemned nor acquitted as in a trial for any offence. Accordingly, by a clause in a recent statute, to which his Lordship called attention yesterday, it was enacted that if, in the trial of a man for any crime or offence, the jury shall be satisfied he is insane at the time of trial, they may find to that effect, and certain precautionary measures shall be taken by the Court for having him detained and confined as an insane person. The difference between that and insanity as a defence against the charge consisted in this, that if the prisoner be insane now he cannot be tried. But if, on the other hand, assuming him to be sane now, you find he was deprived of his reason at the time the act was committed, he must on that ground be now acquitted. Now the case presented to them was this, that the prisoner was not only insane then, but insane now. These being the five questions they had to consider, he should make a few remarks on those points to which their attention must be principally directed. The first two questions called for no remark. He would only remind the jury that the notion of an accident was an after-thought. On his apprehension, the prisoner admitted that he had done it intentionally, stating that he could contain himself no longer, although in inflicting the stab he intended only to give him a touch, and not to kill him. The notion of an accident was not expressed till next morning ; and when they looked into it, they would see it was an impossibility, because the wound in the breast of the deceased pointed upwards, and the position of it was above the level of the post of the stair at which the prisoner said he was lounging when the accident occurred. But the third question, as he had said, required very care-

ful consideration—namely, did the act amount to the crime of murder? They were aware of the distinction between murder and culpable homicide, and it might be sufficient for his purpose to say that unless the deadly wound was inflicted under circumstances which called for it in self-defence, or under circumstances of such extreme provocation that the law and their humanity would make allowance for the infirmity of human nature, it must be considered as murder. As to the fourth and fifth questions, the Solicitor-General adduced the authority of Baron Hume, vol. i. p. 37, to the effect that to serve the purpose of a defence in law, the disorder must amount to an absolute alienation of reason, and that it was not enough to say that the prisoner was a man of strange, moody, sulky humour, or a man of capricious, irritable, and passionate temper. He thought the jury would agree with him in saying that the prisoner was not at the time, nor was he now, either an idiot or a furious madman. He was not even a man of weak intellect. He was according to all the evidence they had on the subject, a man of ordinary average intelligence. But he thought it did appear that he was a man of strange, moody, sulky humour, and that he was a man of strange irritable, passionate temper, but with reason sufficient to guide him, sufficient to enable him to exercise the power of self-control, if he chose to do so. It appeared that for about three years he had been leading a very intemperate and dissipated life, giving himself up to hard drinking, and thereby at once inflaming his passions and aggravating his temper, at once disturbing his judgment and diminishing his power of self-control—diminishing his power to resist the promptings of his passions and his temper. They had the picture of a man naturally of a capricious, irritable, passionate temper aggravating his position by intemperate habits, and by such habits at the same time diminishing his power to restrain his actions. On a review of the whole evidence, the Solicitor-General

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No. 61. concluded by telling the jury that he felt compelled to
Alexander call on them to affirm that Paterson was stabbed by
Milne. the prisoner wilfully, and not by accident ; that the
High Court. the prisoner was not insane now or at the time, but was
Feb. 9, 10, prisoner was not insane now or at the time, but was
11, 1863. fully responsible for the consequences ; and that the
Murder. consequences were those which attached to the crime
of murder.

SCOTT, for the panel, addressed the Jury—With reference to the statements made by the panel to Lieutenant Cowan, he said, As to the declaration that was made before the magistrate, we found him in the Police Office subjected to a long examination by Lieutenant Cowan and Dr. Littlejohn, after being warned in the usual way. The questions were put to him, and were all registered in the mind of Lieutenant Cowan. Next day he was taken before a magistrate, and his written declaration emitted. He (Mr. Scott) would put it to his Lordship whether this statement was part of the evidence at all. They had got this declaration, taken on Wednesday, committed to the slippery memory of a police lieutenant. Then, next day the prisoner was subjected to an examination and a second declaration emitted. That was the legal examination, and Lieutenant Cowan had no right to make an examination, or to give any warning to the man. But since he had made it, the authorities had no right to make a second examination. He maintained that there could be no question that at the time this deed was committed the man was labouring under insane delusions, and was insane ; and there was no evidence to attribute it to nightmare, dreams, or anything else. With regard to the question whether Milne stabbed Paterson intentionally, and whether at the time his mind was in such a condition that he knew right from wrong, counsel contended that Milne was at the time labouring under an aberration of intellect, which rendered him irresponsible for his actions. He also maintained that there was no evidence to show that the prisoner had been drinking

to excess before the fatal deed was committed, and craved the acquittal of the panel on the ground of insanity.

The LORD JUSTICE-CLERK charged the jury, he said—
The case which you have to dispose of is undoubtedly one of great importance and of great delicacy, and I think it must be matter of satisfaction to you, as it is to the Court, that the defence of the prisoner has been conducted throughout with so much ability, moderation, and good judgment. The case is now left for you and me to dispose of. It has received, I think, all the light that it could receive from either side of the bar ; but we cannot disguise from ourselves that we have a very responsible duty still to discharge, and that must be my apology for detaining you, even upon this the third day of the trial, with rather a lengthened exposition of the evidence. But before I enter upon that, I wish you distinctly to understand what are the various questions that you have to consider and to dispose of. The charge in the indictment is that, upon the 7th January last, the prisoner, within his own shop, assaulted the now deceased James Paterson, and stabbed him with a dagger or poignard, in consequence of which he was mortally wounded and immediately thereafter died, and was thus murdered by the prisoner. Now, in ordinary circumstances, under that indictment, you might return four different verdicts. You might find the prisoner guilty of murder ; you might find him guilty of culpable homicide, if you did not think the case came up to murder ; you might find him not guilty ; or you might find the libel not proven. All that is plain enough, and the only point on which it is necessary to say a word in passing, as regards that aspect of the case, is, that the difference between murder and culpable homicide, is a matter of which it is peculiarly the duty of the jury to judge, and depends entirely upon the circumstances under which the deceased was slain. But there is superadded, in the present case, another and a much more perplexing element, which arises

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from the special defence lodged on behalf of the prisoner. Besides his general plea of not guilty, he pleads that at the time when the act is said to have been committed, he was insane, and acting under the influence of insane delusions.

The first question then is one of pure fact—whether the deceased died from a stab inflicted with a dagger, and about that I need not waste any time, for it is certain from the evidence that that is the case. The second question to be considered is, whether that stab was inflicted by the hand of the prisoner, and upon that point—apart altogether from the question of insanity—there can be just as little doubt, because the prisoner has admitted that the stab was inflicted by his hand. Whether these admissions can be used in evidence against him will depend upon whether he was sane or insane when he made them ; but if he was sane when he made them, then these admissions, coupled with the other evidence in the case, make it abundantly clear that his was the hand that inflicted the fatal blow. It may be, however, that although his was the hand that inflicted the fatal blow it was done by accident ; and of that question you will have to judge. That is one of the statements which the prisoner himself has made—that it was the result of a mere accident ; but if you are satisfied that it was not the result of an accident, then you will have to inquire—supposing the prisoner was sane when he committed the act—whether the act was in its character such as to make it in law murder, or only culpable homicide. Now, in regard to that latter question, it is only necessary for me to observe, in the meantime, that there is one peculiarity in this case, which is not perhaps of very unfrequent occurrence, but which is still of great importance, that the particular manner and circumstances in which the blow was inflicted cannot, and have not, been directly proved—because no one was present to see the blow inflicted. Therefore the amount of malice or dole on the part of the prisoner which is ne-

cessary to constitute the crime of murder is to be inferred only from circumstances, and from the conduct of the prisoner previous and subsequent to the moment at which the blow was inflicted. But all these considerations that I am now presenting to you are subordinate to one other great question which you have got to try—viz., the condition of the prisoner's mind at the time when this act is said to have been committed. If he was insane at the time, he is not criminally responsible, and cannot be convicted under this indictment. If that insanity has passed away since the crime was committed, and the prisoner is now in a condition to be tried for this offence, and in a condition, it may be, to be restored to society as a sane man, then of course your duty under this indictment is to acquit him in respect of his being insane at the time that the act was committed. But if, on the other hand, you are satisfied that he was insane at the time that the act was committed, and that his insanity still continues, your duty is a different one. You cannot then, either convict or acquit him ; you must simply find that he is insane, and the Court will then give such directions for his disposal as the law prescribes.

With reference to the examination of the panel by the Lieutenant of Police, the Lord Justice-Clerk said—It has been contended by the prisoner's counsel that the examination of the prisoner in the Police Office was an improper proceeding, and that the statement which the prisoner made on that occasion ought not properly to have been received in evidence. Now, the duty of police-officers, when they apprehend a person upon a criminal charge, is to carry him as soon as possible before a Magistrate, in order that he may there have an opportunity of making a declaration, and of giving answers to any questions that may be put to him ; and it is certainly not a proper course for police-officers to anticipate that examination before a

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magistrate and enter upon an examination of the prisoner themselves. About that the Court never have entertained any doubt. But this is a very peculiar case ; and the evidence of what took place when the prisoner was first brought to the police office was allowed to be taken in this case, and laid before you not properly as part of the evidence of the prisoner having committed the act charged against him, but as evidence bearing upon his special defence of insanity ; and if it had not been for that special defence of insanity the evidence would not have been led. Further, I feel persuaded that neither the Lieutenant of Police nor Dr. Littlejohn would ever have dreamt of entering upon that course of conversation or examination, whatever it may be called, that has been laid before you, if the case had been an ordinary one. But they had both been made aware that the prisoner was in a strange state, and it was suspected that there might be something wrong, and therefore they encouraged and led him to make these statements in the peculiar circumstances in which he was brought to the office. I cannot say that they acted inconsistently with their duty in doing so ; on the contrary, I feel bound to say that for the interest of the prisoner himself, it is very fortunate that they did pursue that course ; and, therefore, I think that this evidence is not only legitimately before you, but I think that these gentlemen, who are very well acquainted with their duty, did not by any means transgress the bounds of their duty upon that occasion.

As to the declaration taken before the Magistrate, the learned Judge remarked—Now, with respect to this declaration, of course a declaration made by a man who was insane at the time cannot be made evidence against him ; but then, if the man was insane we need not go any further, but the question is, whether the declaration is not a valuable piece of evidence in this case, in which the first and principal issue which you have to answer is as to the sanity or insanity

of the prisoner. Now, to that extent and effect, undoubtedly the declaration is admissible ; and I would propose that you should deal with it for no other purpose.

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Reverting to the question as to the state of the panel's mind, the Lord Justice-Clerk said—The doctrine of criminal responsibility is exceedingly simple. If a person knows what he is doing—that is to say, if he knows the act that he is committing, if he knows also the true nature and quality of the act, and apprehends and appreciates its consequences and effects—that man is responsible for what he does. If, from the operation of mental disease, he does not know what he is doing, or if, although he knows what is the act that he is performing, he cannot appreciate or understand either its nature or its quality, its consequences or its effects, then he is not responsible. Mr. Scott was, I think, quite right when he said that if you are once satisfied that this man was under the influence of insane delusions at the time this act was committed, you have no occasion to inquire farther, whether he knew what was right from what was wrong, or whether he knew what was murder in the eye of the law, or what was a punishable act ; because if he was in point of fact at the time under the influence of insane delusions, the law at once presumes from that that he cannot appreciate what he is doing. But, gentlemen, you must be quite satisfied that the person is in a condition of mental disorder or disease before you can either find that he is insane, or acquit him on the ground of insanity, at the time the act was done. It is not sufficient to say that the man is in an anomalous state of mind from extrinsic causes—from drinking, or anything else—which makes the bad part of his nature predominate over the better, and which gets the better of the influence of conscience—or that he is in such a state of moral depravity that his conduct and his feelings are, it may be, not worthy of a human being. That is not insanity. Moral depravity, or weakness of mind combined with or caused by

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moral depravity, is not insanity. But if the mind is diseased—that is to say, if the understanding is impaired to the extent I have already explained—then that is insanity, which will take away criminal responsibility.

If there be such insanity, it matters not, as Mr. Scott also very properly stated to you, what was the exciting cause of that insanity. It may be drunkenness—or it may be indulgence in any other vicious propensity—it is of no consequence which it is, if insanity is actually produced and is present at the time. The question, therefore, which you are to solve is, in the first place, whether at the time this act was committed this man was insane, and in connection with that you must also direct your attention farther to this question, whether that insanity still continues; because, according to the conclusion you shall come to upon these two questions, the form of your verdict must depend. If you should be of opinion that this man was insane at the time he committed the act charged against him in this indictment, but has since recovered from his insanity, and is sane now, your verdict would be a verdict of acquittal on the ground of insanity; but if you are satisfied that the man was insane at the time he committed the act, and still continues so, or if you are satisfied that he is insane now, whether he was insane at the time or not, then your verdict must be a verdict of present insanity. If you should come to the latter conclusion you will be kind enough to announce to the Court that you are of opinion that he is now insane, and the Court will then put your finding into the form the statute requires. But, on the other hand, if you should not be satisfied upon the whole evidence that this man is insane now, or was insane at the time when he committed this act, you will then direct your attention to the evidence of the fact itself, and pronounce your verdict of guilty or not guilty as regards this murder charged against him, keeping in view also, of course, that it is in your power in giving your verdict of guilty,

to characterise the act as either murder, or culpable homicide. Now, in going back to this aspect of the case, I must remind you once more how the case stands on the evidence. The prisoner undoubtedly sent for Paterson on the morning of the 7th ; and undoubtedly also on the morning of the 7th he bought a dagger—rather a singular weapon—very soon before Paterson came to him, whether after he had sent for him, or before he had sent for him you will say, according as you think the evidence preponderates the one way or the other. Paterson comes on his invitation, and almost immediately on entering the shop he is stabbed to the heart, rushes out of the house with the fatal wound upon him, and almost immediately thereafter dies. The prisoner from the first does not seek to disguise that the stab was his act. Assuming his sanity, you must take that as evidence against him on his own admission. But you will also consider—still upon the assumption of his sanity—whether the account he afterwards gave is or is not evidence of his guilt of this murder. What the motive of the murder was, upon the assumption of his sanity—upon the view that all these delusions were really not delusions affecting his mind—what the motive of the murder was in that view, you do not know. To say that murder can never be committed without motive is very true in one sense. No act almost can be committed without a motive. But there is many a murder committed without apparent or proved motive. The motive may remain a mystery, while the murder is an accomplished fact. The peculiarity of the case, however, viewed as a case without the element of insanity at all, is undoubtedly this, that the guilt of the prisoner depends a good deal upon the evidence furnished by his own statement—not entirely, of course—it would be most unsatisfactory and uncomfortable if it depended entirely upon evidence furnished by himself—but the circumstances otherwise proved afford very strong evidence indeed, so much so as to render it almost cer-

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tain, apart from his admission, that his was the hand that inflicted the blow. But it is only from a consideration of these circumstances, coupled with the statement of the prisoner, that you can arrive at any solution of the question whether that blow was inflicted with murderous intent, or whether it was inflicted in such circumstances as to infer the guilt of culpable homicide only, or lastly, under such circumstances as to enable you to say that it was the result of accident. Now, here the leading and most important fact is, that nobody saw or knew what passed between these two persons, the prisoner and the deceased at the time the blows were inflicted—all we know is this, that they seem to have been inflicted almost immediately upon Paterson coming to the house—that they were fatal, and inflicted on such a part of the body as, if it was not an accident, indicates on the part of him who did it a very deadly purpose. On the other hand, it is possible that things may have occurred between them when no one was present but themselves, that might tend to diminish, in some degree at least, the malice which is necessarily implied in the crime of murder. If you feel so much doubt about the circumstances, supposing you to be now satisfied that the man was sane, and satisfied that the blow was certainly wilfully inflicted—if you feel so much doubt about the circumstances in which the blow was inflicted as to hesitate whether it was a murder—you know the alternative. You have to find a verdict of culpable homicide.

The jury found the prisoner guilty by a majority, but recommended him to the mercy of the Court.¹

Sentence, death.²

¹ In answer to a question by the Court, the Chancellor of the Jury explained that this recommendation has proceeded on the ground of divided opinion on the part of the Jury.

² This sentence was afterwards commuted to penal servitude for life.

Present,

THE LORD JUSTICE-CLERK,

LORDS DEAS AND ARDMILLAN.

HER MAJESTY'S ADVOCATE—*Gifford A.D.—A. Moncrieff A.D.*

AGAINST

HENRY HARDINGE AND LUCINDA EDGAR OR HARDINGE—
*Badenach-Nicolson.*Mar. 2.
1863.

THEFT—FALSEHOOD, FRAUD, AND WILFUL IMPOSITION—(1.) A panel was charged with falsehood, fraud, and wilful imposition, in so far as he made certain representations, and did, 'by means of these or 'other similar *or* false representations, deceive and impose upon,' certain persons. The minor proposition was objected to, and the Court ordered the word 'or' to be deleted from the libel.

(2.) A panel is guilty of theft, who, by means of false pretences, obtains possession of and appropriates the property of another in the custody of a third person.

(3.) Circumstances in which, under an indictment charging falsehood, fraud, and wilful imposition, or theft, the public prosecutor asked a verdict on the charge of theft only, the mode of imposition proved being different from that alleged.

HENRY HARDINGE and LUCINDA EDGAR OR HARDINGE,
his wife, were charged with

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Falsehood, fraud, and wilful imposition; as also theft, especially when committed by a person who has previously been convicted of theft, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you, the said Henry Hardinge and Lucinda Edgar or Hardinge, are, both and each or one or other of you, guilty of the said crime of falsehood, fraud, and wilful imposition, or of the said crime of theft, aggravated as aforesaid, actors or actor, or art and part: IN SO FAR AS, on the 27th day of October 1862, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, in or near the station at the terminus of the North British Railway Company, at or near Waverley Bridge, Edinburgh, or at or near Canal Street, Edinburgh, you, the said Henry Hardinge and Lucinda Edgar or Hardinge did, both and each or one or other of you, wickedly and feloniously, falsely;

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fraudulently, and wilfully represent and pretend to David Anderson, then and now or lately porter in the employment of the said North British Railway Company, that you, the said Henry Hardinge and Lucinda Edgar or Hardinge, both and each or one or other of you, had been sent by Thomas Gagie, now or lately horse-dealer, and residing with John Ainslie, platelayer, in or near Canal Street, Edinburgh, for a chest and hamper, which had been deposited with, or left in the custody and charge of, the said North British Railway Company by the said Thomas Gagie, the luggage ticket or receipt for which you, the said Henry Hardinge and Lucinda Edgar or Hardinge, both and each or one or other of you, falsely, fraudulently, and wilfully represented and pretended to the said David Anderson had been destroyed or lost by the said Thomas Gagie; and you the said Henry Hardinge and Lucinda Edgar or Hardinge, did, both and each or one or other of you, by means of these or other similar [or] false representations and pretences, deceive and impose upon the said David Anderson, and did induce him, time and place above libelled, to deliver to you, the said Henry Hardinge and Lucinda Edgar or Hardinge, or one or other of you, a chest, &c., the property of the said Thomas Gagie, or of Prudence Edgar or Gagie, wife of, and now or lately residing with, the said Thomas Gagie, and in the lawful possession of the said North British Railway Company; as also a hamper, &c., the property of the said Thomas Gagie, and in the lawful possession of the said North British Railway Company, which you, the said Henry Hardinge and Lucinda Edgar or Hardinge, both and each or one or other of you, then and there received, and appropriated to your own uses and purposes: Or otherwise, time and place above libelled, you the said Henry Hardinge, and Lucinda Edgar or Hardinge, both and each or one or other of you, did, wickedly and feloniously, steal and theftuously away take a chest, &c., the property of the said Thomas Gagie, or of the said Prudence Edgar or Gagie, and in the lawful possession of the said North British Railway Company; as also a hamper, &c., the property of the said Thomas Gagie, and in the lawful possession of the said North British Railway Company.

BADENACH-NICOLSON, for the panels contended—That the prosecutor had taken too great a latitude in the minor proposition applicable to the charge of falsehood, fraud, and wilful imposition, in respect that, after specifying the alleged false representations, the indictment continued, ‘did, both and each or one or other of you, ‘by means of these or other similar [or] false representations and pretences, deceive and impose upon the said ‘David Anderson,’ &c. If such latitude were allowed,

the prosecutor might have false representations entirely different from those specified, and still insist for a verdict against the panels.

The Court was of opinion that the latitude taken by the prosecutor was too great, and ordered the word 'or' (printed in italics in the last quotation,) to be struck out.

The case then went to trial, when it was proved that Gagie had originally deposited five packages with the railway company; that his wife had soon after got up all the packages, except the chest and the hamper with their contents specified in the indictment; that a considerable time afterwards the panels went to Anderson the porter in charge of the left luggage room, and said to him, 'We have come for the rest of our luggage;' that Anderson asked for the ticket or receipt which had been given for the luggage, when the female prisoner said, her husband, indicating the male prisoner, had 'lighted his pipe with it;' that the female prisoner signed the counterfoil in the possession of the railway company, with the words, 'Mrs. Gagie;' and that Anderson, then believing the prisoners to be Mr. and Mrs. Gagie, delivered up the chest and hamper to them, which they carried off and appropriated.

GIFFORD, for the prosecution—maintained to the jury that they should return a verdict of 'Guilty' on the charge of theft.

NICOLSON, for the panels contended—(1.) That the jury could not convict upon the charge of falsehood, fraud, and wilful imposition, because the false representations which had been proved to have been made were entirely different from those set out in the indictment. (2.) The facts which had been proved did not constitute the crime of theft; and the jury could not convict on that charge—Hume, (i. 57,) laid it down, that the distinction between swindling (by which he meant falsehood, fraud, and wilful imposition) and theft consisted in this, that in the latter crime the goods were taken

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No. 62. 'without the consent of the owner,' while, in the former,
 Henry they were taken with his consent, although that consent
 Hardinge. had been obtained by false representations. The dis-
 High Court. distinction was a material one, and ought not to be broken
 Mar. 2. down. In recent times it had been recognised in the case
 1863. of *Samuel Michael*, High Court, December 26, 1842,
 Falsehood, Broun, vol i. p. 472 ; and indeed the structure of the pre-
 &c. or sent indictment, which charged first the one crime and
 Theft. then the other, showed that the prosecutor himself ad-
 mitted that the crimes were different, and that the one
 could not be included within the other. On that view
 of the law, it was impossible to say that the facts proved
 constituted the crime of theft. The goods in question
 had been given up by the lawful custodier (who repre-
 sented the owner) quite voluntarily, although, no doubt,
 he was induced to part with them in consequence of a
 mistaken belief induced by the false representation of
 panels.

The LORD JUSTICE-CLERK, in charging the jury, said—
 It was quite necessary to consider the effect of the
 panels being charged, *first*, with the crime of swindling,
 and, *second*, with that of theft. It might be that the
 facts proved amounted to a case of swindling ; but it did
 not follow that they might not also constitute the crime
 of theft. In regard to the observations which had been
 made by the counsel for the prisoners on the discrepan-
 cies between the facts applicable to the charge of
 swindling, as stated on the indictment, and the facts
 as established in evidence, the Court would not say
 that they were fatal so as to preclude the jury from
 returning a verdict of guilty on the first charge ;
 but there was, at all events, sufficient doubt on that
 point to make it proper that the jury should direct their
 attention to the charge of theft only, in regard to which
 there was no difficulty in point of law. If a man went
 to a person in possession of the property of another, and
 by any false pretext whatever obtained it from the
 custodier, carried it off, and appropriated it to his own

purposes, that was theft. The jury would consider the facts, as bearing on the second charge in that view of the law, and return a verdict in accordance with their judgment on the facts.

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The jury found the panels 'guilty of theft' as libelled, but recommended them to the leniency of the Court. In respect whereof, they were sentenced to be imprisoned for eighteen calendar months.

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THE LORD JUSTICE-CLERK,

LORD NEAVES AND JERVISWOODE.

CHARLES M'LEAN, Suspender—*A. R. Clark,*

AGAINST

HENRY MACFARLANE, Respondent—*Gifford.*

SUSPENSION—OPPRESSION—JUSTICE OF PEACE CONVICTION—MASTER AND SERVANT—STATUTE 4TH GEO. IV. C. 34—PROCEDURE—RELEVANCY.—In a suspension of a conviction of a workman for deserting his master's service, in contravention of the Statute 4th Geo. IV. c. 34, on the ground of oppression, inasmuch as no time had been afforded to the suspender to lead proof or obtain the assistance of a law-agent, the Court refused an application for suspension on the ground that it was not sufficiently averred by the suspender that delay had been asked and refused, although at the bar that averment was made and proof of it was offered.

THIS suspension was brought of a conviction by a Justice of the Peace for Lanarkshire, of contravention by the suspender of the Act 4th Geo. IV. c. 34, by leaving his master's service without warning.

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The respondent, a cooper in Glasgow, presented a complaint to the Justices of Lanarkshire, setting forth the 3d section of the Act 4th Geo. IV. c. 34, which empowers Justices, on proof that any workman of the

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No. 63. classes enumerated in the Act has left his service before
M'Lean v. the contract with the master has ended, or is guilty of
Macfarlane. any other misconduct, to pronounce a warrant com-
High Court. mitting such workman to the house of correction for a
Mar. 9. period not exceeding three months. The petition stated
1863. that M'Lean had contracted to serve Macfarlane as a
Suspension. cooper for an indefinite period of time, but subject to
the rules of the petitioner's cooperage, well known to
and understood by the defender, whereby it was, *inter
alia*, agreed and understood that one week's warning
should be given by the workmen before leaving the em-
ployment; that M'Lean entered to the petitioner's
service as a cooper on the 4th November 1862, but that
without notice or warning, and without the suspender's
consent, or any good cause, he had deserted his service
on the 11th, and subjected himself to the penalties in
the Act.

The minutes of procedure bore that the petitioner deponed that the statements in the complaint were true, and that the Justice thereupon granted warrant for the apprehension of the defender.

Proof was led before the Justice of the existence of a rule in the cooper trade that a servant should give a week's warning before leaving service, and receive a week's warning before dismissal; that this was the rule in the petitioner's cooperage; and that it was known to the suspender; that immediately before he left, the suspender had complained of an injury to his arm which disabled him from working, but that he was found immediately afterwards working in the employment of another cooper in Glasgow. The minutes of procedure bore that the defender declared he had no proof to adduce,—a declaration which was signed by the defender.

The Justice found the complaint proved, and sentenced the defender to fourteen days' imprisonment, and in terms of the statute abated a proportional part of his wages for that period.

In the suspension the suspender averred that he had

been apprehended, and immediately brought before the Justice; that he had no time to procure professional advice, and no opportunity to adduce proof; that there was no proof that the rule requiring a week's warning was ever exhibited in Macfarlane's cooperage; that there was no such rule in the trade, as the suspender could have proved, but had not been prepared to do so for want of time, and because no such general rule was averred in the petition; that no such rule applied to his case in any view, because he was employed for piece work, and not on a time engagement of any kind.

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The ground of suspension stated at the bar was oppression. It was averred that the suspender had asked, but had been refused delay, and that, if he had got delay, he could have proved that there was no general rule in the cooper trade, nor in the respondent's cooperage known to him, or applicable to his case, which required him to give a week's warning. The suspender at the bar offered proof that delay had been asked and refused—*Orr v. M'Callum*, High Court, June 25, 1855, Irvine, vol. ii. p. 183.

LORD NEAVES.—The grounds of this suspension are frivolous and untenable. There is nothing like an averment of oppression. There is no substantial averment that this man made any remonstrance when called on to plead. He has put on record his declination to lead evidence, and it would endanger the administration of justice in Justice of Peace Courts, if after that we were to entertain a complaint on the ground of oppression on such averments as those on record. And I cannot enter into the view that a skilled workman is to be dealt with as an ignorant man, and requires the protection of the Court like a child under age, or that he cannot understand the charge made against him, or put questions to witnesses. To hold that would involve a reflection on the working men of this country which I am not inclined to make. The evidence as to the practice of trade was quite re-

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levant. If it was a general rule of the trade that a week's warning should be given, that made it the more probable that the existence of that rule in the respondent's cooerage was known to the complainer. His knowledge, besides, is otherwise proved.

LORD JERVISWOODE concurred.

LORD JUSTICE-CLERK.—An allegation of oppression, if it is well made, is a perfectly relevant ground of suspension. But it must be kept in view that the allegation of oppression involves a very serious charge against the magistrates, and it is quite out of the question to entertain it without clear and specific averments. This case is very simple, and has apparently been conducted in an unobjectionable though summary way.

The suspender was apprehended, under a warrant duly issued, and brought before a magistrate. He pleaded not guilty—the charge against him being that he entered the service of the petitioner as a cooper, and that it was a condition of the engagement, and was known to the suspender to be so, that one week's warning should be given by a workman before leaving the employment; that he had, without such warning and without leave or good cause, left the petitioner's service, and had thereby broken his engagement and contravened the Act 4th Geo. VI. c. 34.

It is not denied that the suspender left without warning, and that he was found working in the employment of another master. His only defence was, that he had not sufficient knowledge of the condition of his employment as to the warning which he was bound to give.

We must look into the evidence to discover the ground for the suspender's allegation of oppression, and there we find perfectly sufficient evidence that this condition as to warning was perfectly well known to the suspender. And so far from being an unusual condition which the suspender was not likely to know, it is the universal practice of the trade. On the face of

the proceedings the allegation of oppression is clearly negatived.

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At the same time, if it had been distinctly and pointedly averred by the suspender that when put at the bar he had moved for delay, and that that motion had been refused notwithstanding his statement that he had evidence to lead on a defence which he was not then in a condition to maintain, that would have been a very different case, and I do not say what we might have done had such a case been made. But in the bill I think we find the clearest evidence of an intention to shrink from such an averment. There is nothing on record like an averment relevant to support the general allegation of oppression.

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The case presents a marked contrast to the case of *Orr*. There the averment that delay had been asked and refused was very clear and special, and it derived a certain plausibility from the nature of the case, about which there was a good deal of popular feeling in the place where the trial had taken place. The result there was, that the ground of suspension was so far proved that the bill of suspension was passed.

The suspension was refused.

W. H. MUTR, S.S.C.—HILL & ROBERTSON, W.S.—Agents.

GEORGE JUPP, Suspender—*Patton—Millar*,

AGAINST

SIR GEORGE DUNBAR, Respondent—*A. R. Clark*

SUSPENSION—JUSTICE OF PEACE CONVICTION—COMPETENCY.—Circumstances in which, where a suspender alleged that he had been convicted under the Day-Poaching Act, and had been fined, and where the conviction was not written out, the Court refused the suspension as incompetent, because there was no conviction.

No. 64. THE respondent presented an application to the
 Jupp v. Justices of the Peace for the county of Caithness, in
 Dunbar, which he accused the suspender of a contravention of
 High Court, the 1st section of the Day-Poaching Act, 2d and 3rd
 Mar. 9. Will. IV. c. 68, by trespassing on the respondent's
 1863. lands of Tannach, on 15th September last, in the day-
 Suspension, time, without leave, and in search of game. The com-
 plaint prayed for warrant of apprehension and infliction
 of the statutory penalty. The Justices, on the oath of
 a credible witness, granted warrant for the complainer's
 apprehension; but the warrant was not executed, as the
 suspender appeared in Court, when he pleaded not
 guilty. The minute of the proceedings before the
 Justices then proceeded thus:—

‘Thereafter, the following witnesses were examined on oath in
 support of the complaint:—1. Andrew Cleugh, junior, residing at
 Ochclate, on the estate of Thrumpster.

‘The Justices having considered the complaint, with the evidence
 adduced, finds the’—(*No more of the sentence was written out.*)

The suspender presented this note of suspension, in
 which after setting forth, *inter alia*, what is above stated,
 he averred that, though the sentence was only written
 out as above, the Justices had, in point of fact, sentenced
 him to pay a fine of £2, with expenses of process; that
 it was stated to him that the sentence had been duly
 pronounced, and he was informed that, unless the fine
 and expenses were instantly paid, he would be at once
 sent to prison. To avoid incarceration, as he stated,
 he paid the fine and expenses. He now prayed the
 Court to quash the sentence, and ordain the respondent
 to repay the fine and expenses.

He argued that the complaint was incompetent, be-
 cause it did not set forth that the offence was committed
 in the statutory day-time; besides, the proceedings were
 utterly irregular. No sentence had been recorded; still
 there was a pretended sentence; and a sentence had
 been pronounced on him in point of fact, and the fine

had been extorted from him. The utter informality of the proceedings was apparent, but such informality should be no reason for not now setting them aside.

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LORD JUSTICE-CLERK.—There is nothing to suspend. The suspender complains that the fine has been extorted from him on the representation that he had been sentenced, while in fact no sentence had been pronounced. On that ground he may or may not have a remedy in another form; but it cannot enable the Court to quash a sentence which never existed. The suspension must be refused as incompetent.

The other Judges concurred.

Suspension refused as incompetent.

HORNE & ROSE, W.S.—JOHN SHAND, W.S.—Agents.

Present,

THE LORD JUSTICE-GENERAL,

April 2,
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LORDS DEAS AND ARDMILLAN.

WILLIAM DAWSON, Suspender—*Badenach-Nicolson*.

AGAINST

MALCOLM M'LENNAN, Respondent—*A. B. Shand*.

SUSPENSION—BANKRUPTCY—FRAUDULENT CONCEALMENT OF PROPERTY
—PERJURY—SHERIFF—JURISDICTION—ASSIZE—CHALLENGE OF
JUROR—TIME (LIBELLING OF)—AMENDMENT OF LIBEL—PROCEDURE.
—A Sheriff-Substitute has jurisdiction to try the offence of wicked,
felonious, and fraudulent concealment or clandestinely putting away
by a person whose estates have been sequestrated, and who is un-
discharged, of property or effects which belonged to him prior to
such sequestration, for the purpose of defrauding his creditors.

A peremptory challenge of a juryman in a criminal case must be
stated when the name of the juryman is called, and therefore

an objection to a sentence by a Sheriff-Substitute on the ground that he had refused to sustain such challenge after the name of the juryman had been entered in the sederunt book of the Court, but before the jury was sworn—*repelled*.

In a suspension of a conviction for fraudulent concealment and putting away of property by a sequestrated bankrupt and of perjury.—Held (1.), That the latitude assumed in stating the time was not too great. (2.) That it was not necessary to state in whose possession the goods were prior to their being put away. (3.) Certain inaccuracies in setting forth the statutory oath on which the charge of perjury was founded,—held immaterial. (4.) Amendments of the libel made by the Sheriff held competent.

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ON the 28th February 1863, the complainer was tried at Wick before the Sheriff-Substitute of Caithness and a jury, on a criminal libel at the instance of the respondent, the Procurator-fiscal of court.

The libel contained six charges.

In the major proposition of the libel, the suspender was charged with 'the wicked, felonious, and fraudulent concealment or clandestinely putting away by a person whose estates have been sequestrated, and who is undischarged, of property and effects which belonged to him prior to such sequestration, and which were carried by virtue of such sequestration to the trustee under the same, or his creditors under the sequestration, for the purpose of defrauding his creditors, as also perjury.'

The libel in the minor proposition went on to state the sequestration of the complainer's estates on the 10th September 1862, and the election and confirmation of James Adams as trustee on the estate on 24th September and 6th October 1862.

The fourth charge set forth that the panel, in the knowledge of the subsistence of the sequestration, on various or one or more occasions between the 6th and 10th November 1862, or during a part of the months of September, October, and November 1862, wickedly, feloniously, and fraudulently concealed or clandestinely put away from the trustee, and from the creditors, cer-

tain articles specified in the libel, being a part of the property of the panel, or of the trustee, or of the creditors. The libel then stated the mode in which these articles were put away with the fraudulent intention of appropriating them to the panel's own uses and purposes.

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The fifth charge was, that the panel committed perjury in the course of his examination before the Sheriff-Substitute.

The sixth charge libelled that the panel wickedly and feloniously, &c., took the oath prescribed by the 95th section of the Bankrupt Act as follows, (then followed the oath), which bore in the usual terms that the state of affairs subscribed by the bankrupt contained a full and true account of his effects, 'and that the said *estate*' likewise contains a full and true account of all debts due by me, &c., whereas the truth was, and it would be proved, that the articles set forth in the previous part of the libel as having been fraudulently put away were wilfully omitted from the state of affairs.

The libel concluded that the charges libelled, or part of them, being proved or admitted, the panel 'ought to be punished with the pains of law, to deter him and others from committing the like crime in all time coming.'

The Jury found the first three and the fifth charges not proven, and found the panel guilty of the fourth and sixth charges. The Sheriff-Substitute sentenced the panel to be imprisoned for nine months.

Dawson then brought this suspension and liberation.

In the Bill of Suspension it was stated, that certain objections to the libel had been taken which had been repelled; and it was averred that after the names of the jurymen had been recorded in the sederunt book of the court, but before they had been sworn, the complainer challenged one of them, but the Sheriff-Substitute held that the challenge was too late, and refused to sustain it.

The complainer pleaded, (1.) The Sheriff-Substitute

No. 65. had no jurisdiction to try the offence of fraudulent concealment of property by a sequestrated bankrupt, under
 Dawson v. M'Lennan. which major the fourth charge in the minor fell. Prior
 High Court. April 2. 1863. to 7th and 8th Geo. IV. c. 20, the Court of Session had
 Suspension. exclusive jurisdiction in cases of fraudulent bankruptcy.

By that statute jurisdiction in these cases was extended to the Court of Justiciary. But Sheriffs had no jurisdiction in such cases, either at common law or under the statute, Hume, vol. i. p. 509, and ii. p. 37; Alison, vol. i. p. 567-71; Ersk., iv. 4, 79; Ersk. Prin., iv. 4, 41; *Lord-Advocate v. Duncan*, Court of Session, Jan. 21, 1823, 2 S. and D., 132; and House of Lords, June 28, 1825, 1 W. and S., 608, 616; statutes 1621, c. 18; 1696, c. 5; 54th Geo. III. c. 137, sect. 33.

(2.) The juror though competently challenged, having nevertheless acted, the proceedings were null, *Hugh M'Neillage*, Inverary, Sept. 18, 1850, J. Shaw, p. 459; *John M'Lean*, Perth, Oct. 3, 1836, Swinton, vol. i. p. 278.

(3.) The fourth charge was irrelevant because of too great latitude in the time, Hume, vol. ii. p. 221; Alison, vol. ii. p. 253, and because the libel did not bear where, or in whose possession, the articles specified were before they were as alleged put away, Hume, vol. ii. p. 200; Alison, vol. ii. p. 290; *Elizabeth Tonner*, Glasgow, Dec. 22, 1846, Arkley, p. 215; *John O'Reilly*, High Court, July 14, 1836, Swinton, vol. i. p. 253.

(4.) The sixth charge was irrelevant because, (1.) The fifth charge setting forth perjury founded on the bankrupt's examination, and a separate charge of perjury could not be founded on the statutory oath; (2.) This oath was inaccurately set forth and unintelligible; (3.) The word 'estate' being used instead of 'state' in the passage quoted above, Alison, vol. i. p. 474; Hume, vol. i. p. 371; *James Affleck*, High Court, May 23, 1842, Broun, vol. i. p. 354.

(5.) The conclusion of the libel was unintelligible be-

cause the word 'crime' was used in the singular number, while two crimes were charged in the minor.

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(6.) The Sheriff-Substitute had struck out the word 'crime' which was incompetent, Hume, vol. ii. p. 280 ; Alison, vol. ii. p. 367 ; and (7.) It made the conclusion of the libel defective and illegal, Hume, vol. ii. p. 155 ; Alison, vol. ii. pp. 219, 221, 309.

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SEAND, for the respondent, the Procurator-fiscal, referred to Hume, vol. i. p. 509, and ii. p. 37, 221, 240 ; Alison, vol. i. p. 567, and ii. p. 219, 253, 309 ; Bell's Notes to Hume, p. 238 ; Statutes 1696, c. 5 ; 1621, c. 11 ; 7th and 8th Geo. IV. c. 22, sect. 16 ; *Lord Advocate v. Duncan*, and *John M'Lean* already referred to.

The LORD JUSTICE-GENERAL.—A great variety of objections, not all of equal importance, have been stated by the counsel for the suspender. The first was as to the jurisdiction, and it was contended under it that the Sheriff had no jurisdiction in cases of fraudulent bankruptcy. The argument was, that until the statute of 6th and 7th Geo. IV., the Court of Session was alone competent to try such a charge, while the statute extended the jurisdiction only to the High and Circuit Courts of Justiciary. It was quite true that the statute did not give the Sheriff any power which he did not possess before. (The Lord Justice-General then commented on the case of *Lord Advocate v. Duncan*, and continued)—Neither the case of *Duncan*, nor any other authority, settled that fraudulent bankruptcy could not be prosecuted at common law. Now, the present indictment was not laid on the Act 1696 ; neither was the crime charged a fraudulent bankruptcy, in either of which cases their might have been more difficulty. The indictment was laid on certain fraudulent Acts, which he (the Lord Justice-General) thought might be tried at common law, and before the Sheriff.

The second objection related to the Sheriff's refusal to sustain the challenge of one of the jurymen. The challenge which had been made was a peremptory one,

No. 65. and the statute said that such a challenge must be
Dawson v. stated when the name of the juryman is drawn. Had
M'Lennan. the challenge been one on cause shown it might perhaps
High Court. have been a ground of exclusion.
April 2.
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Suspension. The third objection was to the manner in which the fourth charge was stated in the indictment. (1.) It was said that the prosecutor had taken too great a latitude in libelling the charge. The latitude that had been taken was regulated by the usage of the Court, and that again depended on the nature of the offence charged. Thus greater latitude was always allowed in cases of fraudulent abstraction by a servant than in ordinary cases of theft. The present was a case in which a greater latitude than usual should have been allowed. It was said that the prisoner was thereby hampered in the use of his plea of *alibi*. But the way in which that plea had been stated by him was such as to deprive him of all ground of complaint on that score. He ought to have made his plea far more particular and precise. (2.) It was maintained that the fourth charge did not set out distinctly in whose possession the articles concealed had previously been. But the indictment set forth whose property they were, and that was enough.

The *fourth* objection consisted of criticisms on the oath which had been taken by the suspender. The true question for consideration was whether this oath being lawfully administered was a false oath? Was this which was set out in the indictment in substance the statutory oath which could have been sustained as such if challenged by a creditor? He (the Lord Justice-General) thought it was, and therefore that the criticisms on it were not well founded.

The *fifth* objection was rested on the Sheriff having it was said illegally and unwarrantably struck out the word '*crime*' from the conclusion of the indictment. He (the Lord Justice-General) had always been jealous of striking words out of the libel. It was not a common practice in his early experience, but it seemed to be

much more frequently necessary now. The deletion of words in an indictment must however be dealt with according to their materiality. He could not regard the word which had been deleted in the present case as material. Indeed he did not think that the connection in which it occurred was an indispensable part of the indictment at all. The conclusion of the indictment was complete at the words 'pains of law.' What followed was not material at all. He was therefore of opinion that the bill of suspension must be refused.

Lord DEAS and ARDMILLAN concurred.

The Court repelled the objections, and refused the Bill of Suspension, with expenses.

GIBSON & TAIT, W.S.—THE CROWN AGENT.—Agents.

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NORTH CIRCUIT.

ABERDEEN.

April 28.
1863.

Spring 1863.

Judges—LORDS COWAN AND ARDMILLAN.

JOHN AND ALEXANDER LOCKIE AND Co., Appellants—*Badenach-Nicolson.*

AGAINST

WILLIAM BROWN, Respondent—*W. A. Brown.*

SHERIFF COURT—STATUTE 1ST VICT. c. 41 (Small Debt Act)—DECREE—DILIGENCE—CHARGE—SIST.—A pursuer obtained decree in absence in a Sheriff's Small Debt Court, and charged the defender on the decree. The charge became inoperative by the lapse of a year, and he gave a new charge.—Held, that the defender might have execution sisted, and the case heard at any time within three months of the second decree.

No. 66.
Lockie and
Co. v.
Brown.
Aberdeen.
April 28.
1863.
Appeal.

On the 23d September 1858, the appellants charged the respondent on an extract small debt decree in absence obtained on 9th October 1856. By the 13th

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section of the Small Debt Act, 1st Vict. c. 41, it is provided, that if a small debt decree 'shall not be enforced by poinding or imprisonment within a year from the date thereof, or from a charge for payment given thereon, such decree shall not be enforced without a new charge.'

More than a year having elapsed since the date of the charge, the appellants, in 1862, gave the respondent a second charge on the decree, the respondent thereupon obtained a sist of execution under the 16th section of the Small Debt Act,¹ providing that when a decree in

¹ The Act 1st Vict. c. 41, sec. 16, provides—'That where a decree has been pronounced in absence of a defender, it shall be competent for him, upon consigning the expenses decerned for, and the further sum of ten shillings to meet further expenses, in the hands of the clerk, at any time before a charge is given, or in the event of a charge being given before implement of the decree has followed thereon, provided in the latter case the period from the date of the charge does not exceed three months, to obtain from the clerk a warrant signed by him sisting execution till the next Court day, or to any subsequent Court day, to which the same may be adjourned, and containing authority for citing the other party, and witnesses and havers for both parties; and the clerk shall be bound to certify to the Sheriff on the next Court day every such application for hearing and sist granted; and such warrant being duly served upon the other party personally, or at his dwelling-place, in the manner provided in other cases by this Act, shall be an authority for hearing the cause; and in like manner, where absolviter has passed in absence of the pursuer or prosecutor, it shall be competent for him, at any time within one calendar month thereafter, upon consigning in the hands of the clerk the sum awarded by the Sheriff in his decree of absolviter as the expenses for the defender and his witnesses, with the further sum of five shillings to meet further expenses, to obtain a warrant, signed by the clerk, for citing the defender and witnesses for both parties, which warrant being duly served upon the defender in the manner provided in other cases by this Act, shall be an authority for hearing the cause as hereby provided in the case of a hearing at the instance of the defender, the said sum of expenses awarded by the Sheriff, and consigned as aforesaid, being in every case paid over to the other party, unless the contrary shall be specially ordered by the Court; and all such warrants for hearing shall be in force, and may be served by any sheriff officer in any county, without indorsation or other authority than this Act.'

absence is pronounced against a defender, it shall be competent for him, upon consigning certain expenses in the hands of the clerk at any time before a charge is given, or in the event of a charge being given, before implement of the decree has followed thereon, provided, in the latter case, the period from the date of the charge does not exceed three months, to obtain from the clerk a warrant sisting execution, and that in that case, the Sheriff-Substitute shall hear and decide the case. The appellants objected to the sist as incompetent, on the ground that execution could not be sisted under the 16th section, after three months has lapsed from the date of the charge, and that in this case more than a year had elapsed since the first charge. The Sheriff-Substitute repelled these objections, and having heard the case, assolizied the defender.

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Appeal.

The pursuers then appealed to the Circuit Court, on the ground of deviation from the statutory form. They argued, that the decree was final, that under the 13th section of the Small Debt Act, a decree in absence was after a charge put on the footing of a decree *in foro*, except only that the defender might be reponed within three months, but not afterwards.

The Court held, that the 16th section of the statute applied to any charge on a decree in absence against a defender, whenever a party tried to make his decree operative, the remedy given by the 10th section was open to the defender. The previous charge had fallen to all intents and purposes as if it had never been given.

Appeal dismissed.

Judges—LORDS ARDMILLAN AND NEAVES.

GEORGE TOUGH, Appellant.—*Badenach-Nicolson*,

AGAINST

ALEXANDER JOFF, Respondent.—*Skelton*.

APPEAL—STATUTE 25TH AND 26TH VICT. c. 97, (Salmon Fisheries Act)
—WEEKLY CLOSE-TIME—BYE-LAWS—JUSTICE OF PEACE—PROCU-
RATOR-FISCAL (CONCURRENCE OF)—CONVICTION.—Objections to a
conviction for fishing with stake nets during weekly close-time in con-
travention of the Salmon Fisheries, Scotland, Act, 1862.—(1.) That
the Justices who heard the complaint were not the same Justices
who granted warrant; (2.) that the concurrence of the Procurator-
Fiscal was necessary, and had not been procured; (3.) that the
locus was not sufficiently described; (4.) that as no bye-laws as to
weekly close-time had been made under the Act, its provisions in
that respect had not come into operation; and, (5.) that the charge
being alternative that the appellant did fish for or take salmon, the
conviction which was a general one of guilty was bad for un-
certainty—repelled.

No. 67.
Tough v.
Joff.

Aberdeen.
April 28.
1863.

Appeal.

THIS was an appeal against a conviction by the
Justices of the Peace for the County of Aberdeen, on a
complaint at the instance of the respondent, proceeding
on 'The Salmon Fisheries, Scotland, Act, 1862.'

The complaint set forth 'that Joseph Tough, Salmon
'Fisher, Belhelvie, tacksman of the Eggie and Drum-
'side Salmon Fisheries, has been guilty of a breach or
'contravention of the Salmon Fisheries Act, 25th and
'26th Vict. c. 97,' in so far as, upon the 22d day of
February, 1863, being a Sunday, the said George
Tough did fish for or take Salmon at the Eggie and
Drumside Fishings aforesaid, or at one or other of the
said fishings, by means of one or more stake or fly nets,
which it was alleged the appellant had then and there
set, fixed or placed, for that purpose, during the weekly
close-time, whereby he had incurred the penalties of
the statute.

Warrant was granted by two Justices to summon the

appellant, and he appeared and stated various objections to the competency of the complaint. These objections being repelled, he pleaded not guilty. The Justices who heard the cause 'Find the complaint proven, and 'that the said George Tough is guilty of the offence set forth in the foregoing complaint, therefore fine and 'amercciate the said George Tough in the sum of one 'shilling sterling.'

No. 67.
Tough v.
Jopp.
Aberdeen.
April 28.
1863.
Appeal.

TOUGH appealed to the Circuit Court of Justiciary in terms of section 28th of the Act, and contended, (1.) That of the three Justices who heard the complaint only one had signed the warrant to summon the appellant. Under the 28th section of the Act the two Justices who signed the warrant were those who only were authorised to try the complaint.¹ (2.) The concurrence of the Procurator-Fiscal was necessary; offences against the statute were crimes, and the provisions of the statute having reference to the interests of the public. (3.) The *locus* was not sufficiently libelled. (4.) The provisions of the Act as to the weekly close-time had not yet come into operation. The 7th section of the Act provided that the weekly close-time, except for rod and line, should continue from six on Saturday night till six on Monday morning; but that the Commissioners should have power, on the application of the district board, to vary to a certain extent the period at which the weekly close-time should commence. Then by the 6th section the Commissioners were empowered to make regulations with respect to, *inter alia*, 'the due 'observance of the weekly close-time;' and by the 16th section it was provided that on or before the 1st

¹ The Statute 24th and 25th Vict. c. 97, provides, *inter alia*, by section 28, that all offences under this Act may be prosecuted, and all penalties under this Act may be recovered, before any Sheriff or any two Justices acting together, and having jurisdiction in the place where the offence was committed, at the instance of the Clerk of any district board, or of any other person.

No. 67.
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1863.
Appeal.

January 1864, they shall make bye-laws, regulating, among other things, the due observance of the weekly close-time, and should report their bye-laws to the Secretary of State ; and it was provided that any one having interest might state to the Secretary of State objections to these bye-laws. Now, no district under the Act had been formed, nor had any bye-laws yet been made, and therefore the mode in which the weekly close-time was to be observed had not been determined. It was therefore impossible to say what was a breach of the provisions of the statute as to close-time. The Justices of the Peace in deciding that the appellant had contravened these provisions were usurping the duties of the Commissioners, and in effect depriving the persons interested of their right to object to such rules as might be proposed by the Commissioners. The fishings in question were sea fishings. Prior to the Act there was no close-time as to sea fishings. The weekly close-time in this case did not exist till created by the Act. (5.) The charge was alternative for fishing for or taking salmon while the judgment was general, and therefore uncertain.

SKELTON, for the respondent, was not called on to reply.

LORD COWAN said there was no ground for the argument (1.) that the Justices who granted warrant to summon the person accused were the only Justices who could competently hear the complaint ; there were no sufficient grounds for such a construction of the statute, and it was not necessary by the common law. (2.) The concurrence of the Procurator-Fiscal was not required, as any one may prosecute under this Act. (3.) As the appellant was tacksman of the fishings where the offence was said to have been committed, he could not be in doubt as to the *locus*. The fourth objection raised a question of some interest and importance, but not of difficulty. If the appellant's argument were sound, then if the Commissioners should think it unneces-

sary to frame bye-laws, the provisions as to weekly close-time could not be enforced at all. The regulations to be made could only ensure the due observance of close-time. But the provision that there should be a close-time did not depend on such regulations. As to the fifth objection fishing for and taking salmon were not two separate offences, but two modes of committing the same offence.

LORD ARDMILLAN concurred.

Appeal dismissed.

JAMES COLLIE, Advocate, Aberdeen.—A. JOFF, Advocate, Aberdeen.—Agents.

No. 67.
Tough v.
Jopp.

Aberdeen.
April 28.
1863.

Appeal.

GEORGE GREIG, Appellant.—*Badenach-Nicolson*.

AGAINST

ALEXANDER JOFF, Respondent.—*Skelton*.

APPEAL—STATUTE, 25TH AND 26TH VICT. C. 97, (SALMON FISHERIES)—

WEEKLY CLOSE-TIME—CONVICTION—PROCEDURE.—A conviction for fishing during weekly close-time in contravention of the Salmon Fisheries Act of 1862, set aside on appeal, in respect the special facts found proved did not establish the offence charged.

THE appellant was charged at the instance of the respondent with contravention of the Salmon Fisheries Act, 25th and 26th Vict. c. 97, by fishing for Salmon at Millden Salmon Fishings, in the Parish of Belhelvie, with stake or fly nets during weekly close-time.

No. 68.
Greig v.
Jopp.

Aberdeen.
April 28.
1863.

Appeal.

The Justices after a proof—‘ Finds that the two nets ‘ at Millden Fishings, whereof Mr George Greig is sworn ‘ to be the tacksman, were proved to have been set, and ‘ in a fishable condition, during the weekly close-time, on ‘ Sunday, the 22d February last, whereby he rendered ‘ himself guilty of contravening the Act. Therefore find ‘ the complaint proven, and amerciate the said George ‘ Greig in the sum of ten shillings.’

GREIG appealed, and the same objections were taken as in the immediately preceding case of *Tough v. Jopp*.

No. 68. It was also objected that the facts found proven in the
 Greig v. judgment of the Justices did not establish the complaint.
 Jopp.
 Aberdeen. The Court sustained this last objection, because it
 April 28. did not appear from the judgment that the appellant
 1863. had any knowledge of the nets being set.
 Appeal. The Court set aside the conviction.

SOUTH CIRCUIT.

DUMFRIES.

April 14.
 1863.

Judge—LORD DEAS.

HER MAJESTY'S ADVOCATE.—*A. Moncrieff A.D.*

AGAINST

ADAM COUPLAND—*Mair*,

AND

WILLIAM BEATTIE—*Cowan*.

ASSAULT — EVIDENCE — HEARSAY — LUNATIC — SENTENCE.—In a charge of assault alleged to have been committed against a lunatic patient by two keepers in the asylum, a witness for the prosecution deponed that he asked the lunatic 'Who had assaulted him?' The question objected to by the prisoner's counsel, and disallowed by the Court, the lunatic not being on the list of Crown witnesses, and there being no proof that he was incapable of giving evidence.

(2.) Two keepers in an asylum sentenced to six months' imprisonment for an assault on a lunatic patient.

No. 69. ADAM COUPLAND and WILLIAM BEATTIE were charged
 Adam with assault, especially when committed to the effusion
 Coupland of blood, serious injury of person, and danger of life,
 & William
 Beattie.

Dumfries.
 April 14.
 1863.

Assault.

IN SO FAR AS, on the 16th day of January 1863, or on one or other of the days of that month, or of December immediately preceding, in or near the Southern Counties Asylum, situated in the parish and shire of Dumfries, you the said Adam Coupland and William Beattie did, both and each or one or other of you, wickedly and feloniously attack and assault Thomas Lorimer, then and now or lately a patient in said Asylum, and did seize hold of him and throw him down, and with your fists and feet, strike and kick him repeatedly on his head, sides, and other parts of his person, and did otherwise maltreat and

abuse him; by all which, or part thereof, the said Thomas Lorimer was hurt, bruised, and wounded, to the effusion of his blood, serious injury of his person, and danger of his life.

No. 69.
Adam
Coupland
& William
Beattie.

MAIR, for the prisoner Coupland, moved that the prisoners be tried separately. The case was one of a very peculiar kind, and he based his motion on the grounds that the person alleged to be injured was not included in the list of witnesses, because he was not considered capable of giving evidence in a court of justice, while on the other hand it was proposed to adduce as witnesses for the Crown five insane patients in the Asylum who were admittedly the only persons present when the alleged assault was committed. The only sane persons present were the prisoners, and he thought it indispensable that they should be tried separately, in order that they might have the benefit of each other's testimony. If ever there was a case in which the motion for a separate trial ought to be granted it was the present.

Dumfries.
April 14.
1863.
Assault.

COWAN, for the panel Beattie, did not concur in the motion. He thought the prisoners ought to be tried together, but if they were to be tried separately, then he would move that Beattie be not put on oath until after he had been tried.

LORD DEAS.—It is perfectly competent to move for a separation of the trials, and it is quite competent for the Court to order that separation. At the same time it is a very unusual thing for the Court to interfere in that way. The public prosecutor is supposed—and I think rightly supposed—to conduct all these prosecutions in the manner which he thinks fair towards the prisoners and towards the public. He is invested with a large discretion; he is in use to exercise, and he is entitled to exercise, a large discretion, and it is not usual for the Court to interfere with that discretion. It is so unusual that during all the experience I have had as a public prosecutor and a judge, although I may have frequently heard the motion for a separate trial made, I have not.

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Adam
Coupland
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Beattie.

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April 14.
1863.

Assault.

been concerned in any case in which it was granted. At the same time I do not mean to say that it is incompetent, nor would I refuse it on that ground if sufficient reasons were stated. If sufficient reasons were stated to lead me to doubt whether the public prosecutor was exercising a sound and fair discretion, I would certainly order the trials to be separated ; but I cannot say that I see anything in this case which goes very peculiarly in that direction. On the face of the indictment the case appears peculiar in this respect, that the alleged assault was committed within the bounds of a lunatic asylum, and upon a patient in that asylum. The prisoner's counsel says that all the witnesses are to come from the asylum ; that may or may not be so, but I will assume that it is so. It rather appears to me that the presumption is that that would create a difficulty on the part of the public prosecutor in proving the case, and if there was a difficulty of that kind the prisoners would have all the benefit of it, so that, even if it stood there, I should greatly doubt whether I would be called on to interfere. But when this motion, made on behalf of one of the prisoners, is objected to on behalf of the other, then, even if the Court were more disposed to interfere than it is, I think I would be called on to pause and consider well before granting the motion. Taking the whole circumstances into consideration, it does not appear to me that I ought in point of propriety to interfere, in this case more than any ordinary case, with the discretion of the public prosecutor in having these prisoners tried together.

The panels pleaded Not Guilty, and the case went to trial.

The first witness for the prosecution was one of the attendants in the asylum, who deponed generally to the circumstances of the alleged assault. The Superintendent Keeper of the Asylum was then examined ; he described the injuries on Lorimer's person, and said he had asked Lorimer who inflicted them.

MONCRIEFF, for the prosecution, proposed to ask the witness, ' what Lorimer said in reply ? '

COWAN, for the panel Beattie, objected.—Lorimer was not included in the list of witnesses, but the Crown was bound to produce the best evidence, viz., the evidence of the person assaulted if he was in life. It was only in the case of a person who was dead that the statement of what he said could be received. On the face of this indictment there was no reason stated for the non-production of this witness. It was merely said that he was a patient in the Asylum, but that was not conclusive evidence of his insanity, so as to prevent his being adduced as a witness.—*Hugh M'Namara*, High Court, July 24, 1848, Arkley, p. 521, and Dickson on Evidence, p. 844.

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MONCRIEFF, for the prosecution, replied, that Lorimer's statement was part of the *res gestæ*. The value of it as evidence might be very little, but as part of the circumstances in the case he submitted that it ought to be laid before the jury.

LORD DEAS was quite clear at this stage of the case he could not admit the evidence. The Advocate-Depute might maintain that Lorimer was incapable of being adduced as a witness, but it did not follow that that would be made out, and counsel for the prisoner would have an opportunity of putting him in the witness box.

The question was therefore disallowed.

Thereafter in course of the trial—

MONCRIEFF, for the prosecution, asked the assistant-surgeon of the Asylum as to the mental condition of Lorimer.

COWAN, for the panel Beattie, objected.—The question applied to the particular form of mania or excitement under which the patient was supposed to labour—he said ' supposed,' because it was not stated in the indictment that he laboured under any form of mania, or any incapacity to be present there that day, and the ground on which he objected was, that he was entitled

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to have notice of the reason why the person assaulted was not there. Such notice he had not received, and it was not stated in the indictment, all that was stated there being that Lorimer was a patient in the asylum.

The ADVOCATE-DEPUTE in reply said, he was not aware of any principle in law under which he was bound to give notice of all the kinds of evidence he meant to lay before the jury.

LORD DEAS.—It is quite true that in a number of cases the person assaulted is the best evidence, but the public prosecutor is not always bound to put him in the list of witnesses. He may have a dozen of persons who were looking on and saw it all, and who are even more to be believed than the person who was assaulted, and there may be many reasons why he should not be put in at all. And besides, we do not yet know for what purpose and for what effect this line of examination is proposed to be gone into. There is no reason to suppose as yet that it goes farther than to account why the person assaulted is not put into the witness box. I do not see that I can exclude the question.

The surgeon deponed, that Lorimer was suffering from chronic mania, and was incapable of understanding an oath. He also deponed, that two of the witnesses in the list, patients in the asylum, were capable of giving evidence, but the question of their admissibility was not raised, as the prosecutor did not put any of them in the box.

The declarations of the panels were to the effect that Lorimer had struck another patient, that Coupland and Beattie had interfered, and a scuffle had ensued, in which Lorimer was slightly injured. It appeared, however, from the witnesses, that Lorimer's injuries were considerable, and there was additional evidence of a scuffle between the panels and Lorimer.

Evidence was led for the defence, with the view of proving that Lorimer was a dangerous lunatic, but the evidence on this point was conflicting.

Counsel for the panels contended, that part of the injuries Lorimer had sustained might have been inflicted by other lunatics whom he had attacked, and part of them might have been received by him accidentally when falling. Keepers in an asylum were, or might be warranted in using a certain measure of force, and even of violence, in controlling a lunatic. It was not proved that the panels had gone beyond that.

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LORD DEAS charged the jury.—He said, in an ordinary case, where one man attacked another, where the parties are in no peculiar relation to each other, the man who is attacked is quite entitled to retort what he gets. He is not entitled, even then, to carry the violence upon his part beyond what is reasonable and necessary. He is entitled to defend himself, and if there is good ground for apprehending that his life is in danger, he may even go the length of taking the life of the other man rather than lose his own. But then, in a case that occurs within the walls of an asylum, and where the question is between the keeper and his patients, you will see that the rule of law must be very different. If a patient strikes a keeper, the keeper is not entitled to strike back upon the patient on the same principle as he would be entitled to do upon a man who assaulted him on the high-road. He is certainly entitled to do what is necessary to protect himself from any serious injury. If his life were in imminent danger, he might even be entitled to take the life of the patient rather than lose his own. But the ordinary principle applicable to other cases certainly does not apply here. He is not entitled to strike back merely because he is struck. If he is struck or violently interfered with in any way, his duty is to go away, if he can, and get assistance, or if necessary, to give information or an alarm; but undoubtedly his duty is, as far as practicable, and as far as is consistent with the safety of his own life, or his own personal safety, to avoid returning violence by violence. And if that were not so, in place of its being an advantage to put

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lunatics into an asylum—instead of its being for the satisfaction of their friends and the safety of themselves and all concerned to have them there—it would be quite the reverse. Certainly all lunatics are not violent, but there are very few of them who may not become so, and no keeper is entitled to take—and I believe no one does take—employment in an asylum without knowing quite well that he may expect to meet with a certain degree of violence there, that he is not entitled to resent violence with violence as he would be elsewhere, and that it is his duty on the other hand to avoid encounters of that kind as far as it is practicable. That is one great reason why lunatics are put into asylums. Therefore although we were to believe in this case that the man Lorimer did use violence to these men at the bar, that is by no means of itself a justification for their using violence to him. A great deal has been said in regard to the use of the words ‘wickedly and feloniously’ in this indictment. These words, I may tell you, are used in all libels of this kind. They mean nothing more than this—whether the assault was committed justifiably or unjustifiably. If there was no other patient in actual danger from the violence of Lorimer at the time, and if the prisoners themselves were not in such danger that they could not escape by walking away, then if they did use violence to Lorimer, that was unjustifiable. The first question then is—whether any violence was used to Lorimer; the second, whether the prisoners used that violence; and the third, was that violence justifiable. Lord Deas then proceeded to remark on the evidence as bearing on these points.

The jury, by a majority, found the panels guilty as libelled, with the exception of the aggravation of danger to life.

Sentence, imprisonment for six months.

A Y R.

Judges—THE LORD JUSTICE-CLERK AND LORD DEAS.

C. B. ROWAN, Appellant,

AGAINST

JAMES MERCER, Respondent—*M'Lean*.

APPEAL—STATUTE 1ST VICT. C. 41, (Sheriff Small Debt Act)—SHERIFF CLERK — DECREE IN ABSENCE — DILIGENCE—POINDING—SIST—PROCEDURE.—Under the 16th section of the Sheriff Small Debt Act it is incompetent for the Sheriff Clerk to issue a warrant sisting execution on a small debt decree after a poinding has been executed. The defender in a small debt action appeared at the first calling and got the cause continued, but without stating any defence. At a subsequent diet he failed to appear, and decree was given against him 'in absence.' Question whether this was properly a decree in absence.

C. B. ROWAN, Writer, Ayr, sued JAMES MERCER, Writer, Largs, in the Sheriff Court of Kilmarnock, for a sum of £6, 15s. The action was called for the first time on 8th November, 1862. An Agent appeared for the defender, and, without stating any defence, got the case continued to 22nd November, when he again appeared and got it continued to 6th December. At the last diet, Mercer having failed to appear, Rowan took decree 'in absence' for the amount sued for. The decree was extracted, and on the 13th February 1863 Mercer was charged. On the 25th February a poinding was executed, but before a sale of the poinded effects had taken place, Mercer on 5th March applied for and obtained from the Sheriff Clerk a warrant sisting execution, under the 16th section of the Sheriff Small Debt Act.¹

At the hearing of the case directed by this section of the statute, the Sheriff-substitute pronounced a

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¹ See the section quoted in foot note to case of *Lockie v. Brown*, above, p. 363.

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decision sustaining the sist against this decision, the present appeal was taken to the Circuit Court of Justiciary in terms of the 31st section of the Act.

The appellant, the pursuer in the small debt action, objected to the competency of the sist on these grounds:—

(1.) The decree of 6th December 1862 was not properly a decree in absence. The contrary can be maintained only on the ground that at the first calling of the case the respondent stated no defence. But it was the design of the Small Debt Act to introduce a summary mode of procedure, under which appearance by a party, especially when made as here for the purpose of getting a case continued, implies at least a denial of the claim made against him. (2.) In the event of a charge being given the statute allows a sist only 'before 'implement of the decree.' That pointing is implement has been expressly decided, *Stephenson & Company v. Dolbins*, Court of Session, Feb. 17, 1852, 14 D. 510; *Anderson v. Anderson*, Court of Session, June 6, 1855, 17 D. 804. And even assuming that it was only implement in part, still the sist would be incompetent, for it was not applied for till *after* the pointing had been executed.

For the respondent it was argued—(1.) In the Small Debt Act 'decree in absence' has no special meaning. The common law rule must therefore be applied, according to which a decree is to be treated as in absence, not only till appearance has been made, but till defences have been proposed, Ersk. iv. 69, 3-6. In the present case the respondent had not stated any defence, nor in point of fact made any denial of the debt sued for. Farther, the decree in question was not one of default. At the time when it was pronounced there was no order standing against the respondent which he had failed to obtemper. (2.) Under the Small Debt Act pointing was a mere step of diligence, imposing indeed a *nerus* upon the goods pointed, but requiring to be completed

by a sale. Until a sale has taken place it cannot be said that the decree has been implemented. The cases referred to by the appellant occurred under a statute of which the language was different from the present. At the most they decided only that poinding was part implement. But the implement contemplated by the present statute was implement in full.

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THE LORD JUSTICE-CLERK.—The appeal raises two questions of general importance. The first is attended with so many difficulties as I at present view it, that I should not be disposed to decide the cause at once, if it depended on that question alone. But there is another question on which I have not any doubt. I shall assume therefore that the decree was in absence, (reads section 16th of the statute). I cannot hold that the section gives the Sheriff power to sist after a poinding has been executed. There is one expression in the clause which has a fixed meaning, viz., ‘sisting execution.’ That is applicable to the case of a decree extracted and a charge given, or of a decree pronounced and a charge threatened. To sist execution is to stay diligence so as to prevent the decree being enforced ; and the question here is, whether the Sheriff Clerk was in the position in which the statute authorises him to issue a sist. It is to be observed that he is the person to issue the sist ; there is no appeal to the discretion of the Sheriff. But here a poinding was executed before a sist was applied for. After that a sist was not a competent mode of staying procedure. The proper form for preventing a threatened sale under a poinding is by a petition for interdict. My view is that the Act entitles a defender to be reponed after a charge, and that only within three months after the charge. But the sist, it is provided, must be ‘before implement.’ In the cases of *Stephenson* and of *Anderson* it was decided under the 1st and 2d Vict. c. 119, that poinding is implement. It is vain to say that the difference of expression between that statute and the Small Debt Act makes any difference on the pre-

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sent question. In that statute the words are, where the decree 'shall not have been implemented in whole or 'in part,' and it is now argued that poinding is only part implement, and that a sale is necessary to constitute full implement so as to bar a sist. But I cannot so read the Act. In the cases referred to the Court held that poinding was implement, although it depended on the result of the sale whether ultimately it would be implement in whole or only in part. But if poinding be implement it makes no difference whether ultimately a sale should realize full payment. On this view the defender was not in a position to obtain a sist. I am of opinion therefore that the appeal must be sustained.

LORD DEAS.—Two objections are here stated to the Sheriff's judgment—(1.) That the decree was not a decree in absence ; and (2.) That it was not competent to grant a sist after a poinding had taken place on the decree. The first objection raises a question of difficulty, and as the decree cannot be said to be one in absence, the question comes to be whether the expressions used in section 16th of the Small Debt Act comprehend what we call in the Court of Session decree of default. I think it is not necessary to decide that question, because, assuming that it was a decree in absence, the further objection is taken that a sist is not competent after poinding, and I think it is a good objection. The cases of *Stephenson & Co.* and *Anderson* decide that poinding is implement. The only difference here is that the statute under which these cases occurred had the words where implement shall not take place in whole or in part. That finds that a poinding is implement, and leaves only the question whether under the Small Debt Statute it is necessary that there should be full implement. I cannot think it is necessary that there shall be full implement. I cannot hold that if the whole sum decerned for, except one penny, had been paid it would be competent to obtain a sist. There are many reasons for this. One is, that the object in giving the pri-

vilege of a sist is that the party shall not be taken unawares without an opportunity of defending himself. Again, the provisions of the statute is that it shall be competent to obtain a sist within three months after a charge provided it be before implement ; but the argument of the respondent makes the reading of the Act that it shall be competent to sist execution *at any time* within three months after a charge. If the debtor makes a partial payment he is acknowledging the decree, and the moment we have it found that poinding is implement, which it is on the same principle as a partial payment, then it follows that the respondent was not in a position to entitle him to a sist in the present case. Farther, to grant the sist is contrary to the spirit and intention of the statute, which is, that after proper notice, litigation should be cut short. Another consequence of the view contended for would be, that the creditor's preference might be cut off by another coming forward and poinding. On the whole I am satisfied that it was not competent here to grant the sist, and that the appeal should be sustained.

Appeal sustained accordingly.

PARTY—T. B. ANDREWS, Writer, Kilmarnock—Agents.

GLASGOW.

Spring Circuit, 1863.

Judge—LORD NEAVES.

HER MAJESTY'S ADVOCATE—*Thoms A.D.—Hamilton.*

AGAINST

JANE M'MAHON OR M'GRAW—*W. Dingwall-Fordyce.*

THEFT—BREACH OF TRUST—INDICTMENT—RELEVANCY.—A panel was charged with Theft, in so far as, having received for temporary use from A. B. a shawl, the property, or in the lawful possession of

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Theft, &c.

A. B., the panel stole the shawl 'above libelled.' (1.) Objection that the crime charged was breach of trust not theft—repelled. (2.) Question, whether it was sufficient to charge the panel with the theft of the shawl 'above libelled,' or whether it was not necessary to repeat in that part of the indictment that the shawl was the property of A. B., but the indictment sustained in respect of the practice.

JANE McMAHON or MoGRAW was charged with the crime of theft, especially when committed by a person who has been previously convicted of theft,—

IN SO FAR AS, on the 11th day of December 1862, or on one or other of the days of that month, or of November immediately preceding, or of January immediately following, in or near the house or premises in or near Cambusnethan, in the parish of Cambusnethan, and shire of Lanark, then occupied by William M'Cabe, quarrier, then residing there, and now or lately residing in or near Stonehouse, in the parish of Stonehouse, and shire aforesaid, you the said Jane M'Mahon or M'Graw having received from Mary Gillespie or M'Cabe, wife of, and then and now or lately residing with, the said William M'Cabe, a printed or other short gown, and a tartan or other shawl, the property or in the lawful possession of the said Mary Gillespie or M'Cabe, or of the said William M'Cabe, in order that you might temporarily use and return them, or one or other of them, on the same day, or within other short space of time, to the said Mary Gillespie or M'Cabe, did, time above libelled, or on an occasion during the period between the 11th and 16th days of December 1862, the occasion more particularly being to the prosecutor unknown, in or near the said house or premises, or elsewhere in the said county of Lanark to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take the printed or other short gown above libelled: LIKEAS (2.), you the said Jane M'Mahon or M'Graw did, time above libelled, or on an occasion during the period above libelled, the occasion more particularly being to the prosecutor unknown, in or near the said house or premises, or in or near the pawn-office or premises in or near Brown Street, in or near Glasgow, then and now or lately occupied by John Clark, pawnbroker there, or elsewhere in the said county to the prosecutor unknown, wickedly and feloniously, steal and theftuously away take the tartan or other shawl above libelled.

W. DINGWALL-FORDYCE, for the panel, objected that the case as libelled was one of breach of trust and not theft.

LORD NEAVES, without calling for a reply, repelled

the objection, but doubted whether the statement as to the property, or possession of the articles alleged to be stolen, dispensed with the necessity for a substantive averment that when stolen they were the property or in the possession of the same person, or of some other person known or unknown to the prosecutor, and he called on the Advocate-Depute to support the libel as laid in this particular.

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THOMS, for the prosecution, admitted the obligation under which he lay to libel substantively whose property or in whose possession the articles alleged to have been stolen were at the time of the alleged theft by the panel, but contended that the words 'above libelled,' as applied to each article when the theft was alleged, had been in practice recognised as tantamount to a repetition of the allegation as to the property and possession previously made when the article was mentioned. It was for this reason that 'aforesaid' or 'above-mentioned' was not used, but 'above libelled,' as the latter embraced all that had been libelled as to the article with which it was connected.

LORD NEAVES said that if it could be shewn by production of precedents that this distinction as to 'above libelled' had been recognised in practice the doubts would be removed, and he would be prepared to hold libel as relevant. To enable this to be done he would continue the case.

The ADVOCATE-DEPUTE next day called the case, and produced a number of indictments at preceding Circuits at Glasgow, where 'above-libelled' was used as in this indictment.

LORD NEAVES then expressed himself satisfied on the point, and held the libel as laid relevant, and remitted it to an Assize.

After trial the case was found not proven, and the panel was dismissed from the bar.

HER MAJESTY'S ADVOCATE—*Thoms A.D.—Hamilton,*

AGAINST

JOHN BRYSON AND OTHERS.—*Mair—Cowan—W. Maclaren—
Bannatyne—Crawford.*

STOUTHRIEF—THEFT—AGGRAVATIONS—INDICTMENT—RELEVANCY—
Opinion of Lord Neaves that 'habit and repute,' and previous conviction of theft cannot be relevantly charged as aggravations of a charge of stouthrief.

No. 72. The indictment in this case charged the panels with
John the crime of 'Stouthrief, especially when committed by a
Bryson and Others. 'person who is habit and repute a thief, and who has
Glasgow. 'been previously convicted of theft.'
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Stouthrief, asked the prosecutor for any authority for libelling
&c. stouthrief with any aggravations.

THE ADVOCATE-DEPUTE referred the Court to the cases of *John Smith*, Ayr, October 2, 1860, Irvine, vol. iv. p. 50, *note*; and *William Thompson*, Glasgow, April 23, 1861, Irvine, vol. iv. p. 47, as necessarily deciding the competency of the crime as here laid with aggravation.

LORD NEAVES held stouthrief to be in the same category with robbery, which admittedly could not be charged with these aggravations, and he held the point not to be foreclosed or decided by the authorities referred to. His own opinion was against the competency of charging any such aggravation.

Thereupon the ADVOCATE-DEPUTE asked leave to depart from the aggravations of stouthrief charged in the indictment, and this having been granted the case went to trial.

HER MAJESTY'S ADVOCATE.—*Thoms A.D.*

AGAINST

THOMAS PHILLIPS.—*Millar.*

CULPABLE HOMICIDE—INDICTMENT—ALTERNATIVE CHARGE—RELEVANCY.—Objection sustained to the relevancy of an alternative charge in an indictment for culpable homicide.

THOMAS PHILLIPS, Quartermaster or Seaman on board Her Majesty's Ship Hogue, was charged with Culpable Homicide,

No. 73.
Thomas
Phillips.

Glasgow.
April 23.
1863.

Culpable
Homicide.

IN SO FAR AS, on the 15th day of January 1863, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, on board the said ship 'Hogue,' then and now or lately lying in the Firth or River of Clyde, at that part thereof known as the Tail of the Bank, and off or opposite or near to the town of Greenock, you the said Thomas Phillips did, wickedly and feloniously, attack and assault the now deceased Alexander Cunningham, then a seaman on board the said ship, and did, with a sword or cutlass, stab the said Alexander Cunningham on or near the left groin, [or did culpably and recklessly use a sword or cutlass], and the said Alexander Cunningham was cut, or the said Alexander Cunningham was otherwise injured, in consequence of which he died on or about the 23d day of January 1863, and the said Alexander Cunningham was thus culpably killed by you the said Thomas Phillips.

MILLAR, for the panel, objected to the relevancy of the indictment in so far as the alternative charge (within brackets above) was concerned. It was not clear whether it was meant to be read along with the first, and as supporting it, or as a second charge. Assuming it to be the latter, it was not enough to say generally that the use of a weapon was reckless and culpable, the particular way in which it was used must be set forth. There was no connection stated between the act of the accused and the wounding of the deceased.

THOMS, for the prosecution, admitted that the second alternative was a second charge, and contended that the only element requiring to be specified was the culpa-

No. 73. bility and recklessness of the panel, and that this was
 Thomas sufficiently set forth.
 Phillips.

Glasgow. LORD NEAVES.—I am clearly of opinion that the
 April 23. libelling of this alternative is not relevant. It is an
 1863. essential and fundamental requirement in all charges
 Culpable that each alternative should be distinct and substantive,
 Homicide. so as to be capable of standing alone if the rest is struck
 out. As I understand this indictment, and as it has
 now been explained, there are two alternatives in this
 minor proposition. I do not fully appreciate the
 libelling of this first alternative, which looks more like
 a charge of murder, though no objection is stated to it.
 As to the second alternative, I cannot say that there is a
 relevant specification. To say that the use of the
 weapon was culpable and reckless is to give no state-
 ment as to the *modus* of the use. These are qualities of
 the act. They are stated chiefly to give the act of the
 accused the quality necessary to make it a crime. What
 did this man do? He is said to have used a sword—
 it is not even said to have been a drawn sword—and
 there are innumerable ways of using a sword. He is
 not said to have been brandishing the sword in the
 vicinity of Cunningham. It is not even said where it
 was done, whether in a room in the ship, or when they
 were together on the masthead, or in the forecastle, but
 merely that it was on board a ship. And it is merely
 said that the accused was using a sword—in some way
 or other. It is only said that one man used a sword,
 and that another man came against or upon it. Where he
 came from, or how he came, whether voluntarily or ac-
 cidentally, is not said. It is further said that he was
 thereby stabbed; but how, or by whom, whether he
 stabbed himself, or was stabbed by another, does not
 appear. The word 'thereby' is not sufficient to connect
 the stabbing with the use of the weapon; it connects
 more with the coming against the weapon. This is alto-
 gether too vague and unsatisfactory; and no case has
 been cited to support it. The charge could not have

stood alone, or if so it cannot be sustained as an alternative. The case of *Temple Annesley*, Dec. 27, 1831, Bell's Notes to Hume, p. 76, is remarkably distinguished from the present in the matter of specification; for in that case the major proposition was more specific than the minor is here. There is no indication where the danger as a natural consequence arose. It is merely said that Cunningham came upon the sword. Had the accused been brandishing it or flourishing it in the face of the deceased it would have been different.

The objection was accordingly sustained, and the second alternative struck out. The relevancy of the indictment in other respects was sustained, and the case went to trial.

It appeared from the evidence that the accused having playfully struck the deceased with the flat side of the sword, the latter unexpectedly turned round coming against the point of the sword, and receiving the wound. On which the Advocate-Depute withdrew the charge, and the panel was found not guilty, and dismissed from the bar.

No. 73.
Thomas
Phillips.

Glasgow.
April 23.
1863.

Culpable
Homicide.

HER MAJESTY'S ADVOCATE—*Thoms A.D.*

AGAINST

WILLIAM AND CATHERINE INGLIS—*Scott—Black.*

FRAUDULENT CONCEALMENT OF PROPERTY—PERJURY—FRAUDULENT BANKRUPTCY—STATUTORY OATH IN SEQUESTRATION—INDICTMENT—RELEVANCY.—Objections sustained to the relevancy of an indictment charging, (1.), Fraudulent concealment of property by a person intending to apply for sequestration; (2.) Perjury, in respect that the bankrupt did not, in the statutory oath, make a full disclosure of his affairs, it not being set forth that this defect referred to the state of his affairs at the time of emitting the oath; (3.), Fraudulent bankruptcy committed by the panels 'while acting in the pre-mises,' as libelled.

No. 74.
William
and Cath-
rine Inglis.

Glasgow.
April 23.
1863.

Fraudulent
Conceal-
ment of
Property,
&c.

THE first crime charged in the major proposition of the indictment was the Wicked and Felonious Concealment, putting away, or disposal, for the purpose of defrauding creditors of the property or effects [of a person intending to apply for and obtain sequestration of his estates, on the false and fraudulent pretence of his being insolvent or bankrupt, or] of a person insolvent, or on the eve of insolvency, or in contemplation of insolvency or bankruptcy.

Counsel for the panels objected to the relevancy of the words within brackets, the objection was sustained, and these words were struck out.

The panel, William Inglis, was charged, *inter alia*, with perjury, and it was libelled in the minor that his estates had been sequestrated, and that he had emitted the statutory oath before the Sheriff-substitute of Renfrewshire, which oath was then quoted ; in the oath the panel deponed, *inter alia*, that the state of his affairs subscribed by him as relative to his oath, contained a full and true account of all his estate and effects heritable and moveable. The indictment libelled that the panel had subscribed a state of affairs as relative to the oath which ‘ did not contain a full and true account, to the ‘ best of your knowledge and belief, of all your estate ‘ and effects, heritable and moveable, real and personal, ‘ wherever situated, and that you the said William Inglis ‘ had not made a full disclosure of every particular rela- ‘ ting to your affairs.’

The Court disallowed this branch of the indictment, because it was not sufficient to say that the state of affairs did not contain a full account of the bankrupt’s whole effects. It was necessary to libel that the state of affairs did not contain a full account of the estate and effects of the bankrupt at the time the oath was emitted.

The last charge in the minor proposition was, ‘ Like- ‘ as you the said William Inglis, by your whole actings ‘ in the premises as above libelled, or part thereof, have ‘ committed and are guilty of fraudulent bankruptcy

‘and you have thus acted as, and you are, a fraudulent
‘bankrupt.’

This also was objected to for the panel, and the objection was sustained.¹

HER MAJESTY'S ADVOCATE—*Thoms A.D.*

AGAINST

WILLIAM HASTIE—*W. M. Thomson.*

PERJURY—SEQUESTRATION—SHERIFF-SUBSTITUTE—EVIDENCE, AUTHENTICATION OF.—Circumstances in which the jury acquitted a panel charged with perjury by giving false evidence in his examination on oath in the sequestration of a bankrupt, the Sheriff-Substitute who took the examination, having been absent during part of the panel's evidence.

THE panel was charged with perjury, in respect of the falsehood of the evidence emitted by him when examined on oath before a Sheriff-Substitute in the course of the sequestration of a bankrupt. In the course of the trial, it was proved that the Sheriff-Substitute had not been present during the whole of the panel's examination, and that he had been absent when a considerable part of the panel's evidence had been read over to him before signing it.

THOMSON, for the panel, then moved the Court to withdraw the case from the jury, because the Bankruptcy Act required the presence of the Sheriff during the examination of a witness, and there was therefore no statutory oath before the Court.

LORD NEAVES sent the case to the jury, directing them that it was for them to consider whether it was sufficiently certain that the portions of the oath said to be

No. 75
William
Hastie.
Glasgow.
April 23.
1863.
Perjury.

¹ For farther proceedings against these panels, see below, of date June 29, 1863.

No. 75.
William
Hastie.
Glasgow.
April 28.
1863.
Perjury.

false had been recorded exactly as emitted by the panel. The presence of the Sheriff afforded the statutory guarantee that the record of the oath expressed the exact meaning of the witness. Here that safeguard was wanting, and it might be that the person who took down the oath had not precisely appreciated the meaning of the witness.

The jury acquitted the panel.

Judges—LORDS NEAVES AND JERVISWOODE.

WILLIAM SINCLAIR, Appellant—*Lamond.*

AGAINST

EMMA ROSA, Respondent—*M'Lean.*

APPEAL—COMPETENCY—SHERIFF COURT—DECREE—SUMMONS—INSTANCE.—Objection to the competency of an appeal to the Circuit Court from a Sheriff's Small Debt Court, on the ground that neither the decree appended to the original summons, nor any certified copy thereof was produced—repelled in respect that the Sheriff Small Debt Court Book contained the decree of the Court.

2. Held that an informality in the statement of the account appended to a small debt summons did not vitiate the instance.

No. 76.
Sinclair
v. Rosa.
Glasgow.
April 25.
1863.
Appeal.

THIS was an appeal to the Circuit Court of Justiciary from the Sheriff Small Debt Court of Lanarkshire. It was objected for the respondent, that the appeal was incompetent on the ground of no process, in respect that neither the decree in the inferior court, nor a certified copy thereof, had been lodged with the clerk,—Small Debt Act, sect. 13, *Barter v. Kennedy*, Perth, Sept. 11, 1861, Irvine, vol. iv. p. 84. Upon these authorities it was maintained, that the only decree which the Court could look at, was that appended to the original summons, or a certified copy thereof; and that the Sheriff Court book (which had been produced), was a mere memorandum of the judgment. The test of this was,

that no diligence could proceed upon any other decree than that appended to the original summons, which could not be considered in any sense an extract, as there was no provision for issuing a second decree in the event of the loss of the original one.

No. 76.
Sinclair
v. Ross.

Glasgow.
April 25.
1863.

Appeal.

Answered for the appellant.—The 13th section of the Act only provides for an extract of the decree being issued by the clerk. The decree itself was contained in the book kept in the Sheriff Court, in terms of the 17th section. This was borne out by other provisions of the statute, and decree being in favour of the respondent, it was not in the power of the appellant to have extracted it. Moreover, the appeal operated as a *sist*, and the Sheriff Clerk could not issue extract. The appeal could be taken in open court when no decree other than that contained in the book had been written out. The book itself was now in the hands of the Circuit Clerk.

The Court held, that the decree was contained in the Sheriff Court book, which was the best evidence of it that could be produced. It was the only thing authenticated by the Sheriff.

On the merits the appellant objected to the decree, in respect that while the summons bore to proceed against him as an individual (he being therein designed as residing in Glasgow), the tenor of the appended account showed that the action was in reality for a debt due to the Royal Liver Friendly Society of which he was secretary, but for whose debts he was not personally liable. Being a debt due to the society, the Sheriff's jurisdiction was excluded by the society's rules, which provides for extrajudicial reference in cases of dispute between the members and the society.

The respondent submitted that the Act and rules did not apply, as the action was against the appellant personally. The account was to be read as disclosing a personal claim, although it had been badly stated.

The Court held that the objection went to the relevancy and not to the competency of the action; and

No. 76.
Sinclair
v. Rosa.

Glasgow.
April 25.
1863.

Appeal.

there was no appeal under the act on a question of relevancy. The account might be informally stated, but it would not do to go into such questions in every small debt case. The decree was truly in terms of the summons, and being so, the Friendly Societies' Act did not apply.

J. M. ROBERTSON, Writer, Glasgow—J. M'ALLISTER, Writer, Glasgow—Agents.

WEST CIRCUIT.

May 5.
1863.

STIRLING.

Judges—LORDS NEAVES AND JERVISWOODE.

HER MAJESTY'S ADVOCATE.—*Thoms A.D.*

AGAINST

CHARLES BUCHAN.—*A. B. Shand.*

CULPABLE HOMICIDE—INDICTMENT—RELEVANCY.—Objection sustained to the relevancy of an Indictment which charged the panel, a druggist's apprentice, with the crime of culpable homicide, in so far as he had held himself out as a competent person to prescribe a proper medicine for a child, and had failed to inform himself, by inquiry at the parent, of the child's age and state of health or strength.

No. 77.
Charles
Buchan.

Stirling.
May 5,
1863.

Culpable
Homicide.

CHARLES BUCHAN, apprentice or shop-boy to a druggist in Stirling, was indicted and accused,

THAT ALBETT, by the laws of this and of every other well-governed realm, Culpable Homicide; as also, Culpable Neglect of Duty by a person holding himself out as competent, and undertaking to prescribe medicine for any of the lieges, whereby any person is bereaved of life, or so seriously injured as to hasten death, are crimes of an heinous nature and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Charles Buchan are guilty of the said crimes, or of one or other of them, actor or art and part: IN SO FAR AS, you the said Charles Buchan being, on the date herinafter libelled, an apprentice

or shop-boy, in the employment of the said John Chalmers, and John M'Allister, cabinetmaker, then and now or lately residing in or near Baker Street, in or near Stirling, having, on the 19th day of November 1862, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, in or near the shop or premises in or near King Street, in or near Stirling, then and now or lately occupied by the said John Chalmers, applied to you the said Charles Buchan for a mixture or medicine of a safe and proper description, and of a nature proper and suitable to be administered to a child, for the purpose of curing or alleviating the violence of a cough with which the child was afflicted, the said John M'Allister intending the same to be administered to his son, the now deceased Andrew M'Allister, then residing with him, and who was then between two and three years of age or thereby, and who was then in a weak and delicate state of health, for the purpose of curing or alleviating the violence of a cough with which the said Andrew M'Allister was then afflicted; and you the said Charles Buchan having then and there held yourself out to the said John M'Allister as competent, and undertaken to prescribe a mixture or medicine of a safe and proper description, and of a nature proper and suitable to be administered to a child, for the purpose of curing or alleviating the violence of a cough with which the said child was afflicted, and it being your duty previous and in order to your rightly prescribing a mixture or medicine of a safe and proper description, and of a nature proper and suitable to be administered to a child for the purpose foresaid, to inform yourself by inquiry at the said John M'Allister of the age and state of health or strength of the child for whom the quantity of mixture or medicine of the description and nature, and for the purpose foresaid, was required, or to enquire and inform yourself as to one or other of these matters, you the said Charles Buchan did, time and place above libelled, wickedly, recklessly, ignorantly, and culpably, fail to inform yourself by inquiry at the said John M'Allister, or otherwise, or at least by sufficient enquiry at the said John M'Allister, or otherwise, as to the age and state of health or strength of the child for whom the quantity of a mixture or medicine of the description and nature, and for the purpose foresaid, was required, or as to one or other of these matters; and you did, then and there, wickedly, recklessly, ignorantly, and culpably, deliver and sell to the said John M'Allister one and a half ounces or other quantity of a cough mixture or other medicine, containing, with other ingredients, two or thereby drachms of a solution of morphia, and one ounce or thereby of paregoric, or other preparation of opium, in every four ounces or thereby of the said mixture or medicine, the quantities of morphia and opium more particularly being to the prosecutor unknown, the aforesaid solution of morphia and preparation of opium being potent narcotic drugs or poisons, or the said mixture or medicine, containing other

No. 76.
Charles
Buchan.

Stirling.
May 6.
1863.

Culpable
Homicide.

No. 77.
Charles
Buchan.

Stirling.
May 5.
1863.

Culpable
Homicide.

dangerous or poisonous substance or substances to the prosecutor unknown, the said quantity of cough mixture or other medicine so delivered or sold being put into a phial which the said John M'Allister had brought with him; and you the said Charles Buchan did, then and there, wickedly, recklessly, ignorantly, and culpably, affix to the phial in which the said cough mixture or other medicine was put by you as aforesaid, a printed label in the following or similar terms:—
'Cough mixture. Two teaspoonfuls at bed-time and one three or four times during the day in water when the cough is troublesome,' you intending, and thus prescribing, the said mixture or medicine to be given or administered in the quantities or doses specified in the the said label, as being the safe and proper quantities or doses of the said mixture or other medicine supplied by you as aforesaid, to be administered to the child for whom the mixture or medicine of the description and nature, and for the purpose foresaid, was applied for by the said John M'Allister, whereas the said quantities or doses were not only not safe and proper, but, on the contrary, were highly dangerous and injurious or fatal quantities or doses to be given or administered to a child of such tender years, and in such a weak and delicate state of health, as the child for whom the quantity of a mixture or medicine of the description and nature, and for the purpose foresaid, was applied for by the said John M'Allister, and of whose age and state of health or strength you ought to have inquired and informed yourself as aforesaid; and the said John M'Allister, and Jane Drummond or M'Allister, wife of, and now or lately residing with, the said John M'Allister, or one or other of them, having, time above libelled, in or near the house or premises in or near Baker Street, in or near Stirling, then and now or lately occupied by them, in pursuance of the foresaid directions and prescription contained on the said label, and affixed by you the said Charles Buchan to the said phial as aforesaid, and relying thereupon, administered to, or caused to be taken by, the said Andrew M'Allister a teaspoonful or thereby of the said mixture or medicine diluted in two or three teaspoonfuls of water, the said Andrew M'Allister became immediately or soon afterwards ill, and died in a few hours thereafter, from the effects thereof; by all which, or part thereof, the said Andrew M'Allister was culpably killed by you the said Charles Buchan, or was bereaved of life, or seriously injured and his death hastened, through culpable neglect on the part of you the said Charles Buchan.

SHAND, for the panel, objected to the relevancy of the indictment, arguing that the statement in the minor proposition did not bear out either of the charges in the major. The parenthetical statement as to the child's 'weak and delicate state of health,' was not any part of

John M'Allister's application for the cough mixture, but was made the gravamen of the charge that the medicine was given for a child in that condition. The failure to enquire into that circumstance was an article of dittay without any precedent. Then the panel was charged not with giving an unsuitable medicine for a child afflicted with cough, but for a child 'in the 'weak and delicate state of health' of this child. The only cases of this description reported were *Robert Henderson* and *William Lawson*, High Court, June 13, 1842, Broun, vol. i. p. 360 ; *Edmund Ferdinand Wheatley*, Glasgow, May 6, 1853, Irvine, vol. i. p. 225, and there the medicine given was libelled as being destructive to health. There could be no good charge without that, *Elizabeth Hamilton*, High Court, Nov. 9, 1857, Irvine, vol. ii. p. 738 ; *William Hardie*, Stirling, April 10, 1847, Arkley, p. 247 ; *M'Manimy and Higgans*, High Court, June 28, 1847, Arkley, p. 321 ; *Alexander Dickson*, Jedburgh, Sept. 16, 1847, Arkley, p. 352 ; *Robert Young*, High Court, May 20, 1839, Swinton, vol. ii. p. 376.

No. 77.
Charles
Buchan.

Stirling.
May 5.
1863.

Culpable
Homicide.

THOMS, for the prosecution, answered—The crime consisted in the panel undertaking to prescribe, and in failing to do what that duty involved, viz. enquiring into the age and condition of the patient. It was not the duty of an apothecary, or of his assistant, to prescribe, but if he undertook that duty, he was liable for the consequences of improperly discharging it. Persons entrusted with the dispensation of drugs and poisons were responsible if they did not take all proper precaution in the directions as to their use. This was a different case from those cited, for if the panel held himself out, as he is stated in the indictment to have done, he was to be presumed, *ex lege*, to be responsible as there set forth. It might be sufficient in defence to prove a specific contract to prescribe, the father well knowing the panel's inexperience, and taking the risk of all the

No. 77.
Charles
Buchan.

Stirling.
May 5.
1863.

Culpable
Homicide.

consequences, but that did not affect the relevancy of the charge as laid.

LORD NEAVES.—I think this indictment is not relevant. I do not regard favourably these alternative indictments ; but it might be something short of culpable homicide, and yet a culpable act, and therefore it may sometimes be expedient to charge both crimes. There is only one narrative. The commencement of this story is, the application of the parent at the shop of Mr. Chalmers for a mixture of a safe and proper description, and of a nature proper to be administered to a child, for the purpose of curing or alleviating the violence of a cough with which the child was afflicted. Then follows what John M'Allister intended to do with the medicine when obtained [reads] ; and it is the nature of the indictment that no such facts are communicated by the parent. These two things are what passed. M'Allister asks for a medicine, and the panel holds himself out as a person competent to prescribe, &c.

I should be sorry if what I say were to raise the belief that persons in charge of apothecaries' shops, or of other shops where drugs are sold, were to be at liberty to prescribe medicines. If a man undertakes to supply drugs, or to perform operations, and injury comes by the want of knowledge or skill with which he works he will be liable, and if this indictment had said that the panel held himself out as a medical man, there might have been a good ground for charge against him. It is not alleged that the panel held himself out erroneously or incompetently. The medicine is not said to be unfit for a child, it is only said to be unfit for a child with a cough as M'Allister's child was. It was the age and the particular state in which the child was that are said to have rendered the medicine unsuitable for it. Nothing is said of his furnishing a wrong or mistaken medicine. But it is said, *it being your duty* [reads]. It will not do to allege a thing to be the duty of a particular individual. The duty must be such as reasonably springs from

the relation of the persons to one another. If it be a druggist's duty to ascertain the age and state of health, I doubt if any enquiry would be satisfactory, short of seeing with his own eyes, and feeling with his own hands, the child's pulse, &c. It is the weak and delicate state of the child that is alleged here, but if a druggist is to enquire into these in all cases, no medicine will be sold. It is a delicate thing to say that the druggist must know how much opium would destroy that particular child. But then there are farther difficulties. What is meant by *ignorantly fail to enquire*? Does it mean that he was so ignorant that if he had enquired it would have done him no good? The prosecutor should have said rather that his ignorance should have prevented him from prescribing as he did.

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Charles
Buchan.

Stirling.
May 5.
1863.

Culpable
Homicide.

What I desiderate is, a clear distinction between a competent man who neglects some duty, and an ignorant man who assumes to do what he is incapable of doing. The assumption of duty on the part of an incompetent man is one thing, and the neglect of duty on the part of a competent man is quite a different thing.

It would be difficult to draw a line that would point out the delict of this boy. It is the neglect to enquire that forms the gravamen of the charge, but if this indictment is sustained, how are we to say to what extent of enquiry is necessary on the part of a boy situated as this boy was? It may be said that there has not been sufficient enquiry, or even that there has not been correct enquiry, but that would not imply the culpability libelled.

LORD JERVISWOODE concurred.

The objection to the relevancy was accordingly sustained, and the panel dismissed from the Bar.

HIGH COURT.

May. 25.
1863.

Present,

THE LORD JUSTICE-GENERAL,

THE LORD JUSTICE-CLERK,

LORDS COWAN, DEAS, ARDMILLAN, NEAVES, AND JERVISWOODE.
[Full Bench.]

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Young—Crichton A.D.*

AGAINST

ANGUS M'KINNON—*Cattanach.*

THEFT—APPROPRIATION—GUILTY KNOWLEDGE—INDICTMENT—RELEVANCY.—A panel A. was charged with Theft, in so far as, having time and place libelled, found a pocket-book and bank notes that had been stolen from or dropped by B., he had wickedly and feloniously appropriated the same to his own uses, well knowing that the same were the property of B., 'or at all events that the same were 'not the property of you the said' A. The libel found irrelevant, in respect that it did not sufficiently set forth guilty knowledge and appropriation on the part of the panel.

No. 78.
Angus
M'Kinnon.

High Court.
May 25.
1863.

Theft, &c.

ANGUS M'KINNON, a fisherman in Fort-William, was charged before the Spring Circuit Court at Inverness, with the crime of Theft :—

IN SO FAR AS, on the 18th day of October 1862, or on one or other of the days of that month, or of September immediately preceding, or of November immediately following, James Macgillivray, road-contractor, then and now or lately residing at Druimarben, in the parish of Kilmallie, and shire of Inverness, having, in or near the High Street of Fort-William, in the parish and shire aforesaid, or elsewhere in or near Fort-William to the prosecutor unknown, had stolen from his person, by some person or persons to the prosecutor unknown, or having dropped or lost in or near the said High Street of Fort-William, or elsewhere in or near the said town of Fort-William to the prosecutor unknown, a pocket-book, containing forty-one pounds sterling or thereby in one-pound bank or banker's notes, the property or in lawful possession of the said James Macgillivray, you the said Angus M'Kinnon did, time and place above libelled, find the said

pocket-book and money, or part thereof, and did, then and there, or in or near the house situated in High Street of Fort-William then occupied by you the said Angus M'Kinnon, or at some other time and place to the prosecutor unknown, wickedly and feloniously, appropriate the same to your own uses and purposes, you well knowing that the same were the property of the said James Macgillivray, or at all events that the same were not the property of you the said Angus M'Kinnon, and did, wickedly and feloniously, steal and theftuously away take the said pocket-book and money, or part thereof, the property or in the lawful possession of the said James Macgillivray.

No. 78.
Angus
M'Kinnon.
High Court.
May 25.
1863.
Theft, &c.

LORD ARDMILLAN, the presiding Judge, certified the case to the High Court, in respect of an objection taken to the libel, that the guilty appropriation of the articles said to have been stolen was not sufficiently set forth.

CATTANACH, for the panel, argued—That the libel was irrelevant, in respect, (1.) That the first part of the narrative had reference to a completed act of theft, with which the panel was not alleged to have had any concern. The charge against him was only the finding and appropriation of the article, and it was incompetent to lead evidence of his connexion with or knowledge with that theft, and any attempt to prove his subsequent connexion with the appropriation, would be an attempt to prove the crime of reset, which was not charged in the indictment. Farther, there must have been a previous dropping by the thief, but that fact was not libelled, nor the time and place of its occurrence, which put the panel at a disadvantage in his defence.—Hume, vol. ii. p. 187, 190 ; Alison, vol. ii. p. 275.

(2.) The guilty knowledge of the panel as to the ownership of the article was not sufficiently set forth. It was necessary to libel explicitly the panel's knowledge of the owner's identity.—Stair, i. 7, 2, and ii. 1, 20 ; Bankton, i. 8, 3, 6 ; cases of *John Smith*, High Court, March 12, 1838, Swinton, vol. ii. p. 28 ; *Jane Pye*, Perth, October 3, 1838, Swinton, vol. ii. p. 187 ; *Thomas Scott*, High Court, November 11, 1853, Irvine, vol. i. p. 305 ; *Mary Reid and others*, High Court, March 3, 1856, Irvine, vol. ii. p. 393.

No. 78.
 Angus
 M'Kinnon. The SOLICITOR-GENERAL, for the prosecution, con-
 tended that the indictment was relevant, and that it
 High Court. was not necessary for the prosecutor, who charges theft,
 May 25.
 1863. to set forth any facts or circumstances from which, upon
 Theft, &c. the proof of them, he means to ask the jury to convict
 the accused. It was for the prosecutor to prove all
 the facts and circumstances in support of the charge
 without being under the necessity of setting forth any
modus operandi in the libel at all. It was generally a
 true principle that it was not necessary, to constitute
 the crime of theft, that the prisoner should know the
 owner of the property stolen ; and in this case he did
 not consider that the prosecutor was bound to set forth
 that the prisoner knew who the real owner was, that
 being merely a fact going to prove the guilty mind, and
 which would be brought out in evidence.

The LORD JUSTICE-CLERK.—At one time the law of
 Scotland held, that the finding and appropriation of
 moveable property under any circumstances did not
 constitute theft, but that rule has been modified by the
 decision of this Court in the cases of *Smith* and of *Pye*,
 so that, under certain circumstances, the finding and
 appropriation of moveable property does amount to
 theft. Further than that the old rule has not been re-
 laxed. I think, that in this case, we are asked by the
 prosecutor to apply the principle of the judgments in
Smith and *Pye* to a totally different case. The case of
Smith was one of appropriation to the finder's own
 uses and purposes, he knowing who the owner was ; and
 the same in the case of *Pye*. They were both exactly
 in the same position, and it is not unimportant to ob-
 serve that in the case of *Smith*, where the relevancy of
 such a charge was first sustained, and which was the
 only case in which there was any argument, some of
 the Judges in the majority of the Court, so express
 their opinion as to lead to the inference that but for
 the fact that the owner of the money was known to
 the panel, and known to him at the time—or almost

at the time—when he first took the property, they would not have held the indictment relevant. Whether or not this was a right modification of our old law I give no opinion at present, but it is clear to me that this is all that we have authority for.

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M'Kinnon.
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1863.
Theft, &c.

This indictment is framed so as to charge that particular kind of theft which consists in finding and appropriation, and I do not think it can relevantly be libelled in the way in which it is here libelled. I do not say that it might not be possible for the prosecutor to make a relevant charge or libel as for ordinary theft in such a case as the present, but it would not be safe for him to do so, because the *amotio* and the felonious intent are charged as taking place at one and the same time, and under such a libel he would run the risk of its being proved that these elements did not concur, but that the taking was innocent, and the felonious appropriation was in consequence of an after purpose. There is, therefore, a necessity for libelling such cases in a different way from that in which the prosecutor may libel an ordinary case of theft.

A case of finding of course pre-supposes loss, because finding means the finding of something which is out of the possession of the owner and in nobody's possession at the time, and the stealing of that is a very different act from the stealing of a piece of property which is in some one's possession, and as to which you must libel where it was, and from whose possession removed. In a case of finding it is indispensable that the prosecutor should say first who lost the thing—whether he must set forth in what manner is another question—and further, he must set forth that at some time and place the panel found the thing, and then or at some other time appropriated it to himself in such a way as to amount to a crime in the eye of the law, that is, *lucri faciendi gratia* at the expense of the true owner.

The charge as set forth in this indictment does not

No. 78. seem to me to be borne out by the authority of any pre-
 August vious case, or by any correct or intelligible principle of
 M'Kinnon. our criminal law. For example, a person finds a thing
 High Court. which is of no great value, he cannot find the owner, and
 May 25. after a considerable period, and having discharged every
 1863. obligation incumbent on him he appropriates it—what-
 Theft, &c. ever may be said of the transaction in a purely honour-
 able point of view, can it be said that that is theft? In
 dealing with this class of cases we must be very careful,
 and so draw the line as clearly to distinguish them, even
 in a moral point of view, from ordinary cases of theftu-
 ous awaytaking.

In this libel let us take one alternative, that this
 pocket-book having been lost or dropped in the month
 of October on the street of Fort-William, and having
 been found by the panel, he did then and there on or
 near said street, wickedly appropriate it not know-
 ing whose property it was. I say this is the meaning
 of the last alternative, not because the words 'at all
 'events' are precisely equivalent to 'not knowing
 'whose property it was;' and though, therefore, had
 this charge stood alone and not as an alternative, it
 might have been possible to put another construc-
 tion on it, yet here the alternative is so framed, that I can
 give it no other meaning than that M'Gillivray was
 the true owner, and if the panel did not know that
 M'Gillivray was the owner, then he did not know who
 the true owner was.

It appears to me that this charge might cover the
 case of a thing being found on the 18th October, and
 having remained in his possession innocently for a long
 time, while enquiry was being made concerning the
 owner, the accused being all that time quite willing to
 restore the article, but that some time before May 1863,
 he at last appropriates it to his own use. This clearly
 does not come up to the crime of *theft*. It may be very
 questionable in point of *honour*, but it is not that griev-
 ous violation of moral right which is implied in *theft*.

Such is the case before us, and I should be sorry to pre-
 judge any other which may arise under other circumstan-
 ces with other more specific words, or greater precision in
 the libelling of the time between the taking and the ap-
 propriation, or as to the time of the guilty knowledge on
 the part of the panel; but for the present I must take
 these things exactly as I find them in this indictment,
 and I am of opinion that this charge is irrelevant.

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 1863.
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LORD COWAN.—I concur in the opinion which has just been delivered. As now the only Judge on the bench who took part in the decision in the case of *Reid*, I think it right to state, that I did not at the time, and do not now, view that case as having been decided on the footing of the articles having been found and afterwards feloniously appropriated; but this charge was stated, and dealt with on an averment of an alternative mode of theft. The case of *Reid*, therefore, has no application; and the only cases which touch it, even in appearance, are the cases of *Smith* and *Pye*. The view I take of such cases as the present is this:—It appears to me that it requires a very different case to be set forth from what would suffice in an ordinary charge of theft. The finding of the articles may have been at the time a perfectly innocent act, and it is therefore indispensable that the libel proceed to state when and where, and how this innocent possession (as we must assume it to be) came to an end. Thus the prosecutor who has to deal with possession that may have been innocent at first, must, in the minor proposition of his libel, negative the presumption of innocence. It is because this has not been done here—because the prosecutor has not negatived the possibility of innocence which arises from the first part of the statement in the minor—that I am for holding this libel irrelevant. Take, for example, the words on which so much observation has been made, ‘you knowing the same to be the property of the true owner, or at least that the same was not your property.’ Now this does not negative innocent posses-

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sion, inasmuch as every finder knows that what he finds is not his own, and his merely continuing in that state of mind, does not negative his innocence in taking and keeping possession of what might have been *derelict*. Had the alternative in the libel even been, that the thing found was known to the prisoner to be 'at all events the property of some person to you unknown,' that would have been more satisfactory, because then the prosecutor must have satisfied the jury that the panel knew the subject to belong to some one whose property had been feloniously taken as libelled. Further, this libel is objectionable on another ground. The prosecutor takes an alternative as regards the time of the alleged felonious appropriation, which might be extended so as to cover appropriation, even at an interval of some years after the first finding, which is certainly objectionable. On the whole, I have no difficulty in holding this libel to be irrelevant.

LORD ARDMILIAN.—When this objection was first stated to me at Inverness, I was disposed to sustain it; but as the point was important and novel, I did not think it quite right to do so, sitting alone on Circuit; but after hearing the very able and ingenious argument for the Crown, I am still of opinion that the objection is good.

Before the case of *Smith*, it had been generally supposed, that in order to found a relevant charge of theft, there must be a felonious intention at the first obtaining of the thing, but that case decided that the criminal appropriation may follow upon an innocent taking, and may take place after an interval of time, and that lost goods may be stolen by the finder.

But in that case it was specially charged, that the owner was known to the finder, and I do not think that any one of the Judges who decided the case of *Smith*, would have decided it the same way, if it had been alleged in the indictment that the owner was not known to the panel. The Lord Justice-General Boyle was un-

doubtedly of that opinion, and so was Lord Moncreiff, and also Lord Cockburn, whose opinion is particularly clear and pointed. The present case as now presented to us is different, for we have to consider here whether it is theft if the finder does not know the owner. The appropriating of an article found, knowing it is not my own, and knowing that it must belong to some one else, *may*, indeed, be theft, but it does not necessarily amount to that crime. It may be that the finder conceals or defaces the article, or denies the possession of it, or withholds it when claimed, or gives a false description of it, or flies from the place ; or it may be that he does none of these things, but simply retains it. These or similar circumstances may in particular cases give such a colour to the act of appropriation of a found article, as to make it amount to theft, even though the finder does not know the owner. But this libel which alleges only that the prisoner found certain property and appropriated it, not knowing whose it was, does not seem to me to be relevant.

No. 78.
August
M'Kinnon.
High Court.
May 25.
1862.
Theft, &c.

The Solicitor-General has contended, that even the finding need not be set forth, because it is sufficient for the prosecutor to say that the prisoner stole the article. To this ingenious argument on the part of the Crown, there are, I think, two answers, 1st, That an indictment in such general terms, where the first possession was innocent, is not according to our practice, and such an indictment would not disclose the true case, and would not give fair information to the panel ; and, 2dly, That if an indictment were framed as he proposes, the question would only be shifted. In that case, it could not arise on the relevancy at all, the prosecutor not stating the fact of finding, but it would arise on the evidence, and it would depend on the attendant circumstances. It would not be necessarily theft.

If the finder knew the owner, yet appropriated the article, that is theft, unless he can clear himself by satisfactory explanation. If the finder did not know the

No. 78. owner, it may be theft, but not necessarily, and the
 Angus prosecutor must set forth facts and circumstances to give
 M'Kinnon. to the act of continuing a possession originally innocent,
 High Court. the character of theft. Therefore I think that this in-
 May 25. dictment is not relevant.
 1863. Theft, &c.

LORD DEAS.—The question we have now to deal with is not of the general kind submitted in argument for the panel—under what circumstances shall the finder of lost property be held guilty of theft? but whether this particular indictment relevantly libels theft? In my opinion it does not.

The Solicitor-General rested his argument for the Crown entirely on the proposition that, in an indictment of this kind, it is quite unnecessary to set forth any thing whatever about the knowledge of the panel as to the property or previous possession of the article found, even to the extent of saying, (as is done in this indictment), that the panel knew it not to be his own property. The Solicitor-General contends that it is quite enough to libel the offence as you would libel an ordinary act of theft,—that is to say, to set forth that, at a time and place specified, or at some other time and place to the prosecutor unknown, the panel did wickedly and feloniously steal and theftuously away take the article or articles in question. I cannot assent to that proposition. We have no instance of such an indictment applicable to the case of an article found and theftuously appropriated. There have not been many such cases altogether. But in none of them which have been cited has the indictment been framed on the footing now contended for. In the case of *Smith*, in March 1838, it was set forth that the panel knew the money and bill to be the property of a person named. In the case of *Scott*, in 1853, which related to a mail-bag and letters, the address of one of the letters was set forth in the indictment, and the whole circumstances libelled plainly implied knowledge on the part of the finder that the bag and its contents had been unintentionally

dropped by some one in the employment of the Post Office. In the two unreported Circuit cases cited,—the one at Inverary in Spring 1850, and the other at Dumfries in Spring 1858,—although the alternative here objected to was no doubt in the indictment still knowledge was libelled, so that even these two cases are not precedents for the Solicitor-General's contention that no libelling whatever of knowledge is necessary. The case of *Jean Pye* in 1838, and the case of *Mary Reid* in 1855, were cases of ordinary theft, libelled, (somewhat loosely it may be,) as committed from the pocket or person of a man then in company with the alleged thief, in circumstances implying the knowledge of the panel that the property belonged to that man. It is apparent that neither of these cases were meant to be libelled and tried as cases of articles found and appropriated. The whole of such cases therefore which have hitherto occurred are instances of a practice hostile to the argument of the Crown, that such cases fall to be libelled in similar terms with ordinary thefts. Nor is this different from what we would expect. In cases of ordinary theft the possession is, from the first, a guilty possession. The charge is fully stated and explained by setting forth the time, the place, the nature of the article, and the fact that the panel did then and there wickedly and feloniously steal and theftuously away take that article, the property or in the lawful possession of a person named. The theft there consists in the very act of taking possession. But wherever the original possession is innocent, or must be presumed to be innocent, it is proper and usual to state something to indicate the charge from an innocent to a guilty state of possession, which serves the double purpose of committing the prosecutor to what he is to prove, and of informing the panel of how and on what ground it is that he, whose character and position may be very different from that of an ordinary thief, comes nevertheless to be charged with theft. For instance, the

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1863.

Theft, &c.

case put by the Solicitor-General of a man who hires a horse for a particular journey, and in the course of the journey forms the theftuous purpose of appropriating the horse, and consequently rides off with it,—the practice uniformly is to set forth the contract of hiring under which possession was obtained, and the subsequent appropriation in which the crime really consists: just as in the case of *Smith* and *Wishart* referred to at the bar, the nature of the employment of the panels as officers of the Bank, and how they came to get possession of the money, with the fact of theftuous appropriation to their own uses and purposes, and the circumstances generally, were set forth on the face of the indictment. A similar course ought to have been followed here. To take up money lying on the highway may be, and is presumed to be, an innocent act, and may even be a duty, with a view to its presentation to whomsoever it may concern. The statement made here that the money was lost and found naturally points to an innocent finding. No doubt it is possible that the theftuous intention to appropriate may be coeval with the very act of seeing and lifting the money. But that is not to be presumed, and there ought to be some notice in the libel of what is alleged to have converted the possession presumed to be innocent into a guilty possession. If the finder did not steal nor commit any crime at all when he lifted the money, he ought to be told how it happens that he is charged with the crime of theft. The mere intention, or even the use of an article found, may not always infer theft. If a man finds an orange, keeps it till it becomes useless, and then cuts it, would that be theft? Or suppose he finds a penknife, and while as yet no owner has been discovered he mends his pen, would that be a theftuous appropriation? It is said the finder ought always to advertise the article. But suppose the value of what is found to be less than the necessary cost of advertising, the failure to advertise would not surely imply theft. Nor can the

rule be absolute to lodge in the Police Office whatever is found, as enacted in some Police statutes ; for there may be no Police Office in the locality. The question of theft, in the case of articles found, is always a question of circumstances, and these circumstances ought to be reasonably disclosed in the indictment. I do not say that it may not be theft to appropriate an article found at whatever distance of time after the finding of it. But either some knowledge which ought to have led to restoration of the article, or some conduct or circumstances indicative of guilty purpose having been taken up, ought to be set forth. In the present case, accordingly, the libel is formed on the footing of this being necessary. But the necessity is assumed to be satisfied by simply stating that the panel knew the money not to be his own property. I do not think that is enough. In every case of finding an article lost by another, the finder must know the article not to be his own property. But every case of finding is not theft. The prosecutor must go farther and set forth something to have been known which implies guilt. If that be done I do not say that more lapse of time between the finding and appropriation, or the impracticability of ascertaining the precise time at which the guilty purpose was formed, will necessarily be fatal to the charge. But the mere fact here relied on, that the panel knew the money not to be his own, is a fact not incompatible with innocence, and I am therefore of opinion that the libel is irrelevant.

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M'Kinnon.
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Theft, &c.

LORD NEAVES.—I am of the same opinion. The case of *Smith*, and that class of cases, decided that a finder may, under certain circumstances, be guilty of theft by appropriating to his own use the article found, but then the prosecutor must bring the finder within the circumstances required.

I agree with Lord Deas that it may be not only innocent but laudable to take found property and keep it ; it may be to protect it till the true owner is found ; and

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I must see clearly set forth in the indictment the way in which this possession, innocent and presumed lawful at first, becomes afterwards wicked and felonious. I think the present charge cannot be supported either on principle or with reference to our practice.

LORD JERVISWOODE.—I agree in the opinion that this libel is not relevant. The prosecutor has a great privilege, because anything that constitutes a crime by the law of Scotland may be relevantly charged in the indictment; but as a counterpart of this obligation he has the duty put on him, for the sake of the public and the accused, to set forth fairly what he means to prove.

Now, if his case against the panel is that he feloniously appropriated, and thereby stole this thing, he must state on the face of his indictment facts which will satisfy the Court of the relevancy of the charge. And in a case like this where the possession may have been not merely not felonious but most laudable, I look in vain for such a clear and specific statement as can lead me to sustain the relevancy.

The LORD JUSTICE-GENERAL.—I agree with the opinions that have been delivered, both as to the result and the grounds of judgment.

Looking to the matter which has last been made the subject of discussion it presents an abstract case which is not perhaps likely to be of frequent occurrence. The charges set forth in the alternative is, that at Fort-William a sum of money was dropped by the owner, or by some thief who had stolen it from him, and that the panel, not knowing who it belonged to, did, at the same time and place, appropriate it, and was thus guilty of theft.

I know of no precedent for such a charge under such circumstances. Such an indictment might be made to apply to an innocent person who was in ignorance to whom the thing belonged, or that it was the property of anyone. Every man who finds a thing is presumed in ignorance of who it belongs to; unless, indeed, he finds a thing that he has himself lost; and we

have nothing here to show us how that innocent possession becomes an act of theft. Merely to use the words wickedly and feloniously will not do. I think there is a good deal in the observation of Lord Cowan that it is not said even to have been the property of some one to the prosecutor unknown. The thing may have been some *derelict*, not necessarily thrown away, but something which the owner has ceased to look for. It may *become* a derelict, and I must see something on the face of the libel to show how the innocent possession comes to found a charge of theft.

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Angus
McKinnon.
High Court.
May 25.
1863.
Theft, &c.

Present,

THE LORD JUSTICE-GENERAL,

LORDS DEAS AND NEAVES.

JAMES STEVENSON, Appellant—*A. Moncrieff*.

AGAINST

JOHN MELVILLE, Respondent—*Pattison*.

APPEAL—STATUTES 13TH GEO. III. C. 54, 23D AND 24TH VICT. C. 90
—GAME—QUALIFICATION.—A complaint under the third section of the Act 13th Geo. III. c. 54, charging a person with having game in his possession, 'he not being qualified to kill game in Scotland, ' nor having leave from a qualified person to do so,'—sustained as relevant, although the person complained against had a licence under the Act 23d and 24th Vict. c. 90.

On the 6th December 1862, the respondent, a labourer in Jedburgh, was charged before the Sheriff of Roxburgh, on a complaint at the instance of the appellant the Procurator-fiscal, proceeding on the third section of the Act 13th and 14th Geo. III. c. 54, and charged the respondent with contravention of that section, by 'having two hares and a pheasant in his possession on the

No. 79.
Stevenson
v. Melville.
High Court.
May 25.
1863.
Appeal.

No. 79. ' public road about two miles from Jedburgh, on the
 Stevenson ' 13th day of November last, the said John Melville not
 v. Melville. ' being qualified to kill game in Scotland, nor having
 High Court. ' leave from a qualified person to do so.'
 May 25.
 1863.

Appeal.

The respondent objected to the relevancy of the complaint, in respect he had a license to kill game, and the Statute 23d and 24th Vict. c. 90, virtually repealed the third section of the Act of Geo. III. ; and he pleaded, as no qualification was now required for killing game, any person might purchase game from a licensed dealer, without incurring any penalty. The Sheriff-substitute found the complaint irrelevant, and dismissed it with expenses.

The Procurator-Fiscal appealed on the following grounds :—

' 1. Because the application clause for killing game, ' referred to in the 3d section of the Act 13th Geo. III., ' cap. 54, expressly provides, under schedule L, " that ' no person in *possession of a certificate*, should have ' right to use any dog, gun, or net, or other engine, for ' any of the purposes mentioned in the schedule, at any ' time or times, or in any manner prohibited by any ' law in force, at and immediately before the passing of ' this Act, *nor unless such person shall be duly qualified ' so to do,*" which law is still unrepealed. 2. Because the ' statute 23d and 24th Vict., cap. 90, authorising the ' Justices of the Peace to grant license to deal in game, ' does so only " as far as the same is consistent with the ' provisions of the Act," which does not affect the right ' or qualification to kill game, or entitle any one to do ' so, unless he possesses the old qualification of a plow- ' gate of land. 3. Because the defender, even though ' he may hold a license to kill game, is not entitled to ' do so, unless he owns land, or has a right from a qua- ' lified person to kill game, neither of which qualifica- ' tions he possesses. 4. Although, as the law at present ' stands, all persons are open to a prosecution for having ' game in possession (except persons having the license

‘ to deal in game,) yet, if they have the qualification, and
 ‘ a license, or leave from a qualified person, or can shew
 ‘ that the game was obtained from a licensed dealer, no
 ‘ conviction would follow ; but, failing such evidence,
 ‘ the prosecutor would be entitled to exact the penalty,
 ‘ in terms of the 13th and 14th Geo. III., cap. 54.’

No. 79.
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 v. Melville.
 High Court.
 May 25.
 1863.
 Appeal.

The appeal was heard at the Circuit Court at Jedburgh on 6th April, and was then certified to the High Court of Justiciary, in respect of the importance of the general question raised.

MONCRIEFF, for the appellant, argued that the 13th section of the Act 13th Geo. III., c. 54, requiring a qualification to entitle one to kill game was still unrepealed.

PARNSON, for the respondent, contended that it was no longer an offence to have in custody or to carry game, in respect of the provisions of the Act 23d and 24th Vict., c. 90, and of the English statutes as to game, 1st and 2d Will. IV., c. 32, and 2d and 3d Vict., c. 35, which, in so far as related to the selling of or dealing in game, were extended to Scotland by the 13th section of the 23d and 24th Vict.

The Act 13th Geo. III., c. 54, was virtually repealed. It provided that no man not qualified should on any pretence have game in his custody ; but it could not be doubted that many ‘ pretences ’ justifying the possession or carrying of game had been introduced by later Acts.

The Court held the complaint relevant under the Act 13th Geo. III., and remitted to the Sheriff of Roxburghshire to repel the objections.

Present,

June 1.
1863.

THE LORD JUSTICE-GENERAL.

LORDS COWAN AND JERVISWOODE.

HER MAJESTY'S ADVOCATE.—*Sol-Gen. Young—Gifford A.D.*

AGAINST

ANDREW M'DONALD.—*D. Mackenzie.*

FORGERY—UTTERING—BOND—OBLIGATORY WRITING—INDICTMENT
—RELEVANCY—Objection to the relevancy of an indictment charging
Forgery, as also the wickedly and feloniously using and uttering
as genuine any bond or other obligatory writing—that the document
set forth in the minor was not an obligatory writing according to
the law of Scotland—repelled.

No. 80.
Andrew
M'Donald.High Court.
June 1.
1863.Forgery,
&c.

ANDREW M'DONALD was indicted and accused,

THAT ALBEIT, by the laws of this and of every other well-governed
realm, Forgery; as also the wickedly and feloniously Using and
Uttering, as genuine, any Bond or other Obligatory Writing, having
thereon any forged subscription or subscriptions, knowing the same to
be forged, are crimes of an heinous nature, and severely punishable:
YET TRUE IT IS AND OF VERITY, that you the said Andrew M'Donald
are guilty of the said crimes, or of one or other of them, actor, or art
and part: IN SO FAR AS, on the 18th day of June 1862, or on one or
other of the days of that month, or of May immediately preceding, or
of July immediately following, in or near the house or premises in or
near Roxburgh Street, Edinburgh, then occupied by you the said
Andrew M'Donald, or at some other place in or near Edinburgh to
the prosecutor unknown, you the said Andrew M'Donald did, wickedly
and feloniously, forge and adhibit, or cause or procure to be forged
and adhibited, upon the last page of a bond or other obligatory writ-
ing, in the following or similar terms:—' Know all men by these pre-
' sents, that We William Greig of Plasters House, Markinch, in the
' county of Fife, farmer, and Andrew M'Donald of No. 2 Roxburgh
' Street, in the city of Edinburgh, commission-agent, are held and
' firmly bound to William Worthington and Thomas Robinson of
' Burton-upon-Trent, in the county of Stafford, brewers, in the sum
' of One Hundred Pounds of good and lawful money of Great Britain,
' to be paid to the said William Worthington and Thomas Robinson,
' or the survivors or survivor of them, their or his certain attorney,
' executors, administrators or assigns, for which payment to be well

' and faithfully made, we bind ourselves, and each of us by him-
 ' self, jointly and severally, our and each of our heirs, executors, and
 ' administrators, and every of them, firmly by these presents, sealed
 ' with our seals, dated this eighteenth day of June, in the twenty-
 ' sixth year of the reign of our Sovereign Lady Victoria, by the grace
 ' of God of the United Kingdom of Great Britain and Ireland Queen,
 ' Defender of the Faith, and in the year of Our Lord one thousand
 ' eight hundred and sixty-two: Whereas the above named William
 ' Worthington and Thomas Robinson carry on the business or trade
 ' of brewers, under the style or firm of Worthington and Robinson of
 ' Burton-upon-Trent aforesaid, and have taken the above bounden
 ' Andrew MacDonald into their service to be their agent, to collect,
 ' receive, and get in money for them, and to procure orders, and do
 ' all other in his power incidental to the business and employment of
 ' such agent. And whereas the said William Worthington and
 ' Thomas Robinson have so taken the said Andrew MacDonald into
 ' their service as such agent, in consideration of their having such in-
 ' demnity as herein after mentioned. Now the condition of the above
 ' written obligation is such, that if the said Andrew Macdonald do,
 ' and shall at all times hereafter, so long as he shall continue and be
 ' employed in the service of the said William Worthington and
 ' Thomas Robinson, or the survivors or survivor of them, as their or
 ' his agent, will truly and faithfully account when required with, and
 ' serve the said William Worthington and Thomas Robinson, and the
 ' survivors and survivor of them, without retaining, consuming, wast-
 ' ing, embezzling, losing, misapplying, or making away with any of
 ' the monies, goods, chattels, wares, merchandises, or effects of the
 ' said William Worthington and Thomas Robinson, or survivors or
 ' survivor of them, or of any other person or persons for whom the
 ' said William Worthington and Thomas Robinson, or the survivors
 ' or survivor of them, shall in any ways be responsible, which shall be
 ' committed to his the said Andrew MacDonald's charge, care, or
 ' custody, by reason of his said service as being such agent as afore-
 ' said, then the above written obligation shall be void, but otherwise
 ' to be and to remain in full force,'

' Signed, sealed, and delivered by the above named William Greig
 ' in presence of

' Signed, sealed, and delivered by the above named Andrew Mac-
 ' Donald in presence of,'

the subscription ' William Greig,' or a similar subscription, as the
 subscription of one of the granters of said bond or other obligatory
 writing, intending the same to pass for and be received as the genuine
 subscription of William Greig, then and now or lately residing at
 Plasters or Plasterer's House, near Markinch, in the county of Fife,
 or of some other person to the prosecutor unknown; as also the sub-
 scription and words ' James Reid Plasters House Markinch Fifeshire,'

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 &c.

No. 80. and the subscription and words ' Bryan M'Carthy 2 Roxburgh St,'
 Andrew or similar subscriptions and words, as the subscriptions of two witnesses
 M'Donald. to the signing, sealing, and delivering of the said bond or other obli-
 High Court. gatory writing, intending the same to pass for and be received as the
 June 1. genuine subscriptions of James Reid, then and now or lately residing
 1863. with William Greig before designed, and of Bryan M'Carthy, some-
 Forgery, time residing with you the said Andrew M'Donald in or near Rox-
 &c. burgh Street, Edinburgh, or of some other persons to the prosecutor
 unknown: FARTHER, you the said Andrew M'Donald having enclosed
 the said forged bond or other obligatory writing, or caused the same
 to be enclosed, in an envelope or cover, addressed to Messrs Worthing-
 ton and Robinson, brewers, Burton-on-Trent, or similarly addressed,
 together with a letter, bearing to be dated ' 2 Roxburgh Street, Edin-
 ' burgh 19 June 1862,' and to be addressed ' Mess Worthington &
 ' Robinson,' or to be similarly dated and addressed, did, on the 19th day
 of June 1862, or on one or other of the days of that month, or of May
 immediately preceding, or of July immediately following, at or near
 the General Post Office, in or near Waterloo Place, Edinburgh, or at
 some other place in or near Edinburgh to the prosecutor unknown,
 wickedly and feloniously, use and utter, as genuine, the said forged
 bond or other obligatory writing, having thereon the forged subscrip-
 tions above libelled, you well knowing the same to be forged, by put-
 ting the same, or causing or procuring the same to be put, by some
 person to the prosecutor unknown, enclosed in said envelope or cover,
 addressed as aforesaid, into the said General Post Office, or into one
 or other of the receiving offices, or sub-post offices, in or near Edinburgh,
 the particular post-office being to the prosecutor unknown, for the pur-
 pose of the same being transmitted by post and delivered to and re-
 ceived as genuine, by Messrs Worthington and Robinson, brewers,
 Burton-on-Trent, in order that you might thereby induce the said
 Worthington and Robinson to receive or to continue you in their em-
 ployment as their agent in Scotland, and the said forged bond or other
 obligatory writing was in course of post, or shortly thereafter, carried
 to the premises of the said Worthington and Robinson, in or near
 Burton-on-Trent, and was, then and there, delivered to or received by
 them; and in reliance thereon, and believing the same to be genuine,
 the said Worthington and Robinson received or continued you the said
 Andrew M'Donald in their employment as their agent in Scotland.

D. MACKENZIE, for the panel, objected that the charge was irrelevant, in respect that the document libelled on, and which was set forth as having been uttered in Scotland, was not an obligatory writing by the law of Scotland; Alison, Vol i. p. 371, Act 1593, c. 179.

The SOLICITOR-GENERAL having been heard in reply —

The LORD JUSTICE-GENERAL said—This indictment sets forth that forgery, as also the wickedly and feloniously using and uttering as genuine any bond or other obligatory writing, having thereon any forged subscription, knowing the same to be forged, are crimes of a heinous nature, and severely punishable, and then that the panel is guilty of the said crimes, or of one or other of them, in so far as he forged and adhibited, or procured to be forged and adhibited to the document there set forth the name of certain persons as granters of the deed, and as witnesses thereto; and, farther, that it was uttered by the panel putting the bond, or causing it to be put into the Post Office in Edinburgh.

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&c.

In the course of post this document is carried to this gentleman, Mr. Worthington, and received by him, and on the faith of it, it would appear that the panel was employed or continued as agent in Scotland for his house of business. The bond itself is not limited to agency in Scotland, but is general in its terms.

Now the objection taken is, that while the major proposition of the libel sets forth that the panel forged the subscriptions to a bond or other obligatory writing, the minor proposition sets forth a document which is not a bond or obligatory writing, and that though the fabricating of such a document may be a crime, it is not the crime of forgery.

I am of opinion that the adhibiting a forged name to such a document is not only a crime, but that it is the crime of forgery, and not merely some other species of the *crimen falsi*; and the question then comes to be whether, as this major and minor are stated, we have materials to support the allegation of the forgery of a bond or other obligatory writing.

I think it very clear that this document does purport to be an obligatory writing, for it binds the parties in a certain sum of money.

Farther, I have not heard it stated that had these

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signatures been genuine it would not have been binding by the law of England. The document is general in its terms, not limited to Scotland, and I am not prepared to hold that a bond in the English Form is not an obligatory writing so as to support the present charge. Even on the strictest view of the libel, I do not think it can be asserted that this is not a bond or obligatory writing as in the English form. Burton-on-Trent we know to be in England, and, even if this were a doubtful matter, I don't think it would much affect the present question.

It may be true that this document was in one sense uttered in Edinburgh, where it was put into the Post Office, and therefore is cognizable in this Court; but then the document is delivered in England, and the use of it is in England.

These objections might all have been avoided, and we might have been saved the time spent in this discussion. It might have been set forth that the deed was obligatory by the law of England, or that it purported to be an obligatory writ; but, taking the libel as it stands, I am not prepared to sustain the objection.

LORDS COWAN and JERVISWOODE concurred.

The Court repelled the objection, and held the indictment relevant.

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THE LORD JUSTICE-GENERAL.

LORDS NEAVES AND JERVISWOODE.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Young—Thoms A.D.*

AGAINST

WILLIAM INGLIS and CATHERINE RUSSELL or INGLIS.—*Scott—Black.*

FRAUDULENT CONCEALMENT OF PROPERTY—FRAUDULENT BANKRUPTCY
—INDICTMENT—RELEVANCY.—Terms of an Indictment charging

fraudulent concealment or putting away for the purpose of defrauding creditors of the property of a person on the eve of insolvency, or in contemplation of insolvency or bankruptcy—held irrelevant.

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William
and Catherine
Inglis.

WILLIAM INGLIS and CATHERINE RUSSELL or INGLIS
were indicted and accused—

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THAT ALBEIT, by the laws of this and of every other well governed realm, the Wicked and Felonious Concealment, Putting Away, or Disposal, for the purpose of Defrauding Creditors of the Property or Effects of a person insolvent, or on the eve of insolvency, or in contemplation of insolvency or bankruptcy; As also Fraud; As also the wickedly and feloniously Fabricating False and Fictitious States of Affairs, Accounts, or other Writings, by a bankrupt, or a person whose estates have been sequestered, and using and uttering the same with intent to defraud his creditors; As also Falsehood and Fraud; As also Fraudulent Bankruptcy, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said William Inglis and Catherine Russell or Inglis are, both and each or one or other of you, guilty of the said crimes first and second above libelled, or one or other of them, actors or actor, or art and part; and you the said William Inglis are guilty of the said other crimes above libelled, or of one or more of them, actor, or art and part: IN SO FAR AS [1.], you the said William Inglis having, some time prior to the 22d day of July 1861, become indebted to Thomas Charles Young, writer, and now or lately residing in or near Kelvin Terrace, in or near Great Western Road, in or near Glasgow; John Galletly, solicitor before the Supreme Courts of Scotland, residing in Edinburgh; Thomas Muter, writer, and now or lately residing in or near North Frederick Street, in or near Glasgow; Hugh Mair, bootmaker, and now or lately residing in or near Copeland Road, in or near Govan, in the county of Lanark, and various other individuals; and you the said William Inglis having, at and prior to the said 22d day of July 1861, become insolvent, or being on the eve of insolvency, or in contemplation of insolvency or bankruptcy, and you the said Catherine Russell or Inglis being in the knowledge thereof; and you the said William Inglis and Catherine Russell or Inglis being, at and prior to the said 22d day of July 1861, proprietors of certain valuable heritable subjects in or near High Street, in or near Glasgow; and you the said William Inglis and Catherine Russell or Inglis, or one or other of you, having, some time prior to the said 22d day of July 1861, formed a fraudulent design of borrowing money upon the security of the said subjects, and of carrying off, concealing, or putting away, the money so to be borrowed, and which would, when so borrowed, belong to and become the property of you the said William Inglis in your own right, or *jure mariti*, and of appropriating the same to the uses of

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you the said William Inglis and Catherine Russell or Inglis, or the uses of one or other of you, and depriving the lawful creditors of you the said William Inglis thereof, and thus defrauding the lawful creditors of you the said William Inglis, and in particular those above named, or one or more of them, and you the said William Inglis and Catherine Russell or Inglis, both and each or one or other of you, in pursuance of the said fraudulent design, having instructed the said Thomas Charles Young, in his capacity of law-agent, to negotiate a loan for £1400 sterling, over the heritable subjects above mentioned; and the said Thomas Charles Young having accordingly arranged with Robert Sword, writer in Glasgow, to lend the said sum on the security thereof; and you the said William Inglis and Catherine Russell or Inglis having joined, on or about the 6th day of July 1861, in granting a bond and disposition in security over the said subjects for the said sum of £1400 sterling, in favour of the said Robert Sword, and the said Thomas Charles Young having thereafter delivered the said bond and disposition in security to the said Robert Sword, and received the sum therein contained, or the sum of £1373 or thereby, being the balance of the said sum of £1400, after deducting the expenses connected with the loan payable to the said Robert Sword or his agent; and the said Thomas Charles Young having, on or about the 22d day of July 1861, or one or other of the days of that month, or of June immediately preceding, or of August immediately following, in or near the office or other premises in or near John Street, in or near Glasgow, then and now or lately occupied by the said Thomas Charles Young, paid and delivered to you the said William Inglis and Catherine Russell or Inglis, or one or other of you, the sum of One Thousand Pounds sterling; part of the sum contained in the said bond and disposition in security, you the said William Inglis and Catherine Russell or Inglis, both and each or one and other of you, did, time last above libelled, or at some other time or times to the prosecutor unknown, wickedly, feloniously, and fraudulently, carry off, conceal, or clandestinely put away, or cause or procure to be carried off, concealed, or clandestinely put away, the said sum of One Thousand Pounds sterling, that sum then forming part of the estates of you the said William Inglis, and being up to and until the date of sequestration of the estates of you the said William Inglis hereinafter mentioned, in whole or in part, the property and part of the estates of you the said William Inglis, and this you the said William Inglis and Catherine Russell or Inglis, both and each or one or other of you, did, time last above libelled, you the said William Inglis having become insolvent, or being on the eve of insolvency, or in contemplation of insolvency or bankruptcy, and you the said Catherine Russell or Inglis being in the knowledge thereof, by carrying off or conveying, or causing or procuring to be carried off or conveyed, the said sum of £1000 sterling, to the house or premises at or near Rossbank, in or near

Port-Glasgow, in the county of Renfrew, then occupied by you the said William Inglis and Catherine Russell or Inglis, or one or other of you, or to some other place to the prosecutor unknown, with the wicked and felonious intention of appropriating the same to your own uses, or the uses of one or other of you, and depriving the creditors of you the said William Inglis of the said sum, or part thereof, and thus defrauding the lawful creditors of you the said William Inglis, and in particular those above named, or one or other of them; and you did, both and each or one or other of you, thereafter wickedly, feloniously, and fraudulently conceal, and you have, both and each or one or other of you, since the said 22d day of July 1861, wickedly, feloniously, and fraudulently, concealed the said sum of £1000 sterling, and you have, both and each or one or other of you, failed to surrender, deliver, or account for the same to the trustee on the sequestered estate of you the said William Inglis, or to the creditors of you the said William Inglis, and in particular those above mentioned, or one or more of them; and you the said William Inglis and Catherine Russell or Inglis, both and each or one or other of you, have appropriated the said sum of £1000, in whole or in part, to your own uses and purposes, or to the uses of one or other of you, and you have deprived the creditors of you the said William Inglis thereof, and you, both and each or one or other of you, have thus defrauded the creditors of you the said William Inglis, and in particular those above named, or one or more of them.

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The indictment further set forth the sequestration of William Inglis, and contained in all six charges.

BLACK, for the panels, objected to the relevancy of the indictment—(1.) It was oppressive to the panels to introduce so many alternatives as were stated in the libel, and each alternative taken separately was irrelevant. If the case for the prosecution was that William Inglis was insolvent, it ought to have been distinctly set forth that he and his wife knew that he was so; and if he was solvent, then the charge was plainly irrelevant; besides it was not stated that the creditors have been injured. (2.) Objection was taken to all the charges in the minor proposition, inasmuch as they set forth as a scheme concocted by Inglis or his wife, 'or one or other of them,' that being 'proprietors' of certain subjects, they, or one or other of them, borrowed money on the security of these subjects, and afterwards sold the reversion in order to defraud Inglis

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creditors of the money thus realised. To this it was objected that it was no crime in Mrs. Inglis to raise money on her own property, and appropriate the money raised. (3.) It was objected to the charge of fraudulent bankruptcy, that the sole facts alleged were, that Inglis procured sequestration when solvent, for the purpose of enabling him to defraud his creditors of the money above referred to. It was no crime for a solvent party to procure sequestration ; and such an act did not become criminal by the guiltiness of the purpose.

THOMS replied for the prosecution ; and SCOTT for the panels.

LORD NEAVES.—I am of opinion that this indictment ought not to be sustained. When the panel was tried on another indictment at Glasgow (above p. 387), I was struck by the novelty of the leading charge. The form of the charge is now changed, but I do not think it is improved. The first major set forth is the wicked and felonious concealment, putting away, or disposal for the purpose of defrauding creditors, of the property or effects of a person insolvent, or on the eve of insolvency, or in contemplation of insolvency or bankruptcy, without its being alleged that actual injury took place. It is not here said by whom the property was put away, and the plain object of framing the indictment in that way is to leave room for charging the wife alone with the putting away of the husband's property without the husband being himself implicated. But the circumstance that the case is rested on insolvency makes it exceedingly delicate. Insolvency may depend on so many contingencies, and may arise under so many circumstances, where the putting away of the insolvent's property could not be looked upon as criminal, that I feel great difficulty in sustaining such a charge. Bankruptcy is a definite and intelligible term, and a person who is on the eve or in contemplation of bankruptcy, is in the eye of the law interpellated from any act affecting his

creditors, and has his hands tied up as regards the disposal of his property. If in that condition he puts it away, that of itself is injurious to his creditors, and I do not know that it would be necessary to libel actual fraud.

But the great objection to this indictment goes deeper, and affects it throughout. I mean the objection arising out of the position of these panels in reference to the heritable property libelled. The difficulty of that part of the case is plain from the way in which the prosecutor vacillates in his statement of it. In one of the majors, and in one part of the minor, the panel is supposed to be insolvent, and in a subsequent part of the indictment it is assumed that he afterwards became solvent, and that he knew it. The only theory according to which this can be explained is that the heritable property as it originally stood was not his but his wife's, and in that state of it he was insolvent, but that when the property was turned into money it became his, and thus though not solvent before he thereby became so. But the whole story is of a most peculiar character. It is said that the two panels—the female panel being the owner of the property to an undefined extent—formed a design, in the knowledge that the husband was insolvent or on the eve of becoming so, by which the female panel was first to bring the property within the husband's *jus mariti*, and then to withdraw it again; and it is said that this double act was in defraud of creditors. I cannot understand such a description of a crime. This matter is of the essence of the case; and if there was anything criminal in it, it required a great deal more specification than is given here. The state of the titles might have been libelled, and if it appeared that the property was vested in the husband, then it was within the power of the creditors, and to put it away would have been fraud. But, so far as appears, the property seems to have been partly vested in the female panel; and, if so, I cannot see any fraud in what is alleged to

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have been done. The property being so far hers, in the first instance she might if she pleased have kept it as it was. If she consented to its being changed into money, the money was hers in the first instance as a *surrogatum* for the property; and even if she gifted it to her husband, she was entitled to take it back at any time before the creditors had got possession of it. It does not appear on the face of this indictment that there is any amount of funds properly belonging to the male panel which was withdrawn from his creditors, and therefore there is no clear or specific basis laid for a charge of fraud.

I therefore think that that which is the essence of this case has not been disclosed with the clearness and specification necessary, and that the indictment must be found irrelevant.

LORD JERVISWOODE concurred.

The LORD JUSTICE-GENERAL.—I concur in the conclusion at which your Lordships have arrived. I think it would not be safe or proper to submit this indictment to a jury. There is too lavish a use of alternatives in this indictment. Alternative charges are often necessary in order to present in a clear and definite way those charges against the panel out of which his guilt of the crime alleged is deduced. But if alternatives are used to so large an extent in this indictment, they exclude from the prisoner the knowledge of that which truly constitutes the case against him, or put him to the necessity of preparing to meet a great variety of cases, when it is or ought to be in the power of the prosecutor to state his case more definitely. Some of the alternatives here amounts to this, that certain things were done by the panels, by all of which the panels either were or were not guilty. The guilt of the female panel is not, as it always should be in an indictment, a necessary deduction from the facts averred. I do not go into the minuter objections, but I concur in thinking that the indictment cannot be sustained.

The Court found the libel irrelevant, and the panels were dismissed from the bar.

Present,

THE LORD JUSTICE-GENERAL.

LORDS DEAS AND ARDMILLAN.

July 17.
1863.

DAVID FORSYTH (THOMPSON'S TRUSTEE), Petitioner.—*A. R. Clark.*

AGAINST

ALEXANDER THOMPSON, Respondent.—*Watson.*

JURISDICTION — BANKRUPTCY — EXAMINATION — IMPRISONMENT — A bankrupt was by warrant of the Sheriff-Substitute committed to the prison of Elgin, in respect of his refusal to answer certain questions under the Bankruptcy Act. Pending this imprisonment he was sentenced by the Circuit Court at Inverness to fifteen months' imprisonment in the General Prison at Perth. On the expiry of the latter sentence the Court of Justiciary, on the petition of the trustee, granted warrant to carry back the bankrupt to the prison of Elgin.

IN this case, the respondent, (a bankrupt,) pending his imprisonment in Elgin under a warrant of the Sheriff-Substitute of that county, until he answered certain questions which he had refused to answer, in terms of the 93d section of the Bankruptcy (Scotland) Act, 1856, was sentenced to fifteen months' imprisonment in the General Prison of Perth for the crimes of forgery and fraudulent bankruptcy, and was transmitted to the Prison at Perth, under a warrant of the Circuit Court of Justiciary at Inverness. On the expiry of this latter sentence, a petition by his trustee for a warrant to the Governor of the Prison at Perth to give up the person of the bankrupt, and to messengers-at-arms to take him, that he might be replaced in the Prison of Elgin, there to underlie the first-mentioned sentence, was presented to, and was this day granted by the Court of Justiciary.

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*Forsyth v.
Thompeon.*
High Court.
July 17.
1863.
Petition.

JAMES WEBSTER, S.S.C.—J. NISBET, S.S.C.—*Agents.*

Sept. 17.
1863.

NORTH CIRCUIT.

PERTH.

Autumn 1863.

Judges—LORDS DEAS AND NEAVES.

HER MAJESTY'S ADVOCATE.—*Thoms A.D.*

AGAINST

SAMUEL TUMBLESON—*Balfour.*

ATTEMPT TO MURDER BY MEANS OF POISON—ATTEMPT TO ADMINISTER POISON—INDICTMENT—RELEVANCY.—*Held*, (1.) That 'Attempt to Murder by means of Poison,' and 'Attempt to Administer Poison with the intent of doing great bodily injury,' are relevant points of dittay by the law of Scotland; (2.) That it is not necessary, in order to constitute these crimes, that the poison should actually be taken by the person for whom it is intended.

SAMUEL TUMBLESON was indicted and accused—

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Samuel
Tumbleson.

Perth.
Sept. 17.
1863.

Attempt to
Murder by
Poison.

THAT ALBEIT, by the laws of this and of every other well-governed realm, the Attempting to Commit Murder by means of Poison, especially when such attempt is made by a husband upon his wife; As also the Attempting to Administer to any of the lieges Strychnia or other Poisonous Substance, with the wicked and felonious intent of doing them a great bodily injury, especially when such attempt is made by a husband upon his wife, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Samuel Tumbleson are guilty of one or other of the said crimes, aggravated as aforesaid, actor, or art and part: IN SO FAR AS, you the said Samuel Tumbleson having conceived deadly malice against Elizabeth Holland or Tumbleson, your wife, then or lately before residing with you the said Samuel Tumbleson, in the house of James Tumbleson or Thomelson, weaver, in or near Hospital Park, Dundee, and now or lately residing with Margaret M'Lauchlin or Quin, a widow, in or near Hilltown of Dundee, did form the resolution of putting her to death by means of poison; and having, on the 28th and 29th days of April 1863, or on one or other of the days of that month, or of March immediately preceding, or of May immediately following, had in your custody or possession, within the said house in or near

Hospital Park aforesaid, a quantity of oatmeal which you had purchased, or caused or procured to be purchased, for the purpose of being used by you and your said wife as an article of food, you the said Samuel Tumbleson did, then and there, wickedly and feloniously, put a quantity of strychnia or other poisonous substance into and among a portion of the said oatmeal, and give or deliver the said portion of oatmeal, with strychnia or other poisonous substance therein, to Helen Cassels or Castles or Thumbleson or Thomelson, wife of and then and now or lately residing with, the said James Tumbleson or Thomelson, and did, times or time and place above libelled, direct and instruct her to give the same to your said wife, in order that the same might be partaken of by her as an article of food, and all this you did in prosecution of your wicked resolution of putting the said Elizabeth Holland or Tumbleson your wife to death by means of poison, and thereby murder was, wickedly and feloniously, attempted to be committed by you, by means of strychnia or other poisonous substance, upon the person of your said wife: OR OTHERWISE, you the said Samuel Tumbleson having conceived malice and ill-will against the said Elizabeth Holland or Tumbleson, and having formed the resolution of doing her a great bodily injury, did, times or time and place above libelled, wickedly and feloniously, put a quantity of strychnia or other poisonous substance into and among a portion of the oatmeal which you purchased, or caused or procured to be purchased as aforesaid, and did give or deliver the said portion of oatmeal, with strychnia or other poisonous substance therein, to the said Helen Cassels or Castles or Tumbleson or Thomelson, and did, times or time and place above libelled, direct and instruct her to give the same to your said wife, in order that the same might be partaken of by her as an article of food; and all this you did in prosecution of your said wicked resolution, and with the wicked and felonious intent thereby, of doing the said Elizabeth Holland or Tumbleson, your wife, a great bodily injury.

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BALFOUR, for the panel, objected to the relevancy—
(1.) Attempt to commit murder by means of poison, and attempt to administer poison with intent of doing great bodily injury, are not relevant points of dittay. True, that by Statute (10th Geo. IV. c. 38) acts somewhat similar to those here charged, are declared to be crimes, and severely punishable; but in the present indictment the Statute is not founded upon. At common law, and apart from statutory enactment, such charges cannot be sustained. Indeed, the very circumstance that it was found necessary to pass the Statute referred to, shows that the cases to which it applies were not suffi-

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ently provided for at common law. Attempts to commit crimes want that character of completeness, of finality, which would make it proper to prosecute them criminally. In many such cases it can hardly be said that the individual has proceeded beyond intention,—that he has done anything partaking, in strictness, of the character of an overt act ; and it is of overt acts alone that the law can take cognizance. It is true that a few old cases would seem to support the relevancy of charges like the present ; but sounder views have since come to prevail, and eminent Judges have stated from the bench that their predecessors had gone too far in recognising mere *conatus* as relevant matters of libel. Accordingly, the tendency of recent decisions has been to discountenance the libelling of attempts to commit crimes, *Walter Duthie Ure*, High Court, Feb. 15, 1858, Irvine, Vol. iii. p. 10 ; the older cases referred to having ceased to be authorities.

(2.) But even assuming the charges in the minor proposition to be relevant, they are not supported by the statement in the minor. In attempt to murder by means of poison, much more in attempt to administer poison, it is indispensable that the poison should have reached, and been taken by, the person for whom it was intended ; that, at least, it should have been placed, by some overt act of the person making the attempt, beyond his own control. But there is here no such averment.

THOMS, for the prosecution, answered—(1.) It has never been questioned that attempts to commit the *graviora delicta* are crimes by the law of Scotland—Hume, vol. i. p. 27, 29 ; Alison's Principles, p. 163 *et seq.* Even the attempt to break prison has been held a relevant charge—*Robert Gallie*, High Court, April 22, 1832, Scottish Jurist, Vol. iv. p. 409. Murder is undoubtedly one of the graver crimes. Accordingly, libels charging the attempt to commit it have been frequently sustained. Thus in the case of *Buchanan*, Jan. 15, 1728 (Hume,

vol i. p. 181, *note*), it appears from the records of the High Court that the major proposition charged 'the attempting to poison any of His Majesty's lieges,' and that the Lords found, 'That the said Walter Buchanan having, at either of the times libelled, attempted to poison the said Jean Dougal, relevant to infer an arbitrary punishment.' In the case of *Ramage*, again, Dec. 28, 1825 (Hume, vol. i. p. 28), the major, which was sustained after objection, was in terms precisely the same as those used here. And there are other reported cases to the same effect. (2.) As regards the objection to the minor proposition, in neither of the cases of Buchanan and Ramage was the poison alleged to have been actually administered. In Buchanan's case the minor set forth that the panel delivered the poison 'to John M'Feal, to give to the lady, mixed in ale or other drink, as he should have occasion to drink with her;' that M'Feal became afraid and returned it to Buchanan; and that Buchanan, 'persisting in his wicked intention, did, on the 10th day of August 1723,' &c., 'give the same powder, or some such poisonous drug to James M'Fecitt, messenger, then at Balfour, desiring him at the same time that he would fall upon ways and means to mix it with some drink to be taken by the said lady.' The indictment then went on to narrate that M'Fecitt never gave the powder as directed, having tried it on a bitch with fatal effects; and, therefore, the said James M'Fecitt, or others in his family, destroyed the said powder that none might come to hurt thereby.' In Ramage's case, again, all that the panel was charged with in the minor, was putting poison into a teapot as it stood by the fireplace, 'in order that the same might be drunk by the said Margaret M'Arthur or Jack, at her breakfast on the said day.' Unless these authorities are to be overruled, the present indictment is clearly relevant.

LORD NEAVES.—I have listened with much interest to the objections which have been so ably stated by the

No. 93.
Samuel
Tumbleson.

Perth.
Sept. 17.
1863.

Attempt to
Murder by
Poison.

No. 93.
Samuel
Tumbleson.

Perth.
Sept. 19.
1863.

Attempt to
Murder by
Poison.

counsel for the panel ; but I think that they have proceeded, in some respects, on a misapprehension of the distinction between the common law and the Statute. The view which I take of the Statute is, that it was intended to make certain crimes capital, not to create the crimes, or give them an indictable character. I do not believe that there ever was a time in which the actual attempt to poison was not looked upon as a crime. The Statute made it capital, but at common law it was always criminal. In the case of an attempt to steal, there is a good police offence, but it is not a high crime indictable in the Court of Justiciary. But when we come to consider an attempt to commit a crime such as murder, I think it impossible to doubt that it is indictable. With regard to the second objection, it is true that the mere resolution to commit a crime is not indictable. It requires, of course, to be expressed in some overt act, more or less proximate, before the law can take cognizance of it ; but when, as in the present case, machinery is put in motion, which, by its own nature, is calculated to terminate in murder,—when this agency is let out of the party's hands to work its natural results,—that is a stage of the operation by which he shows that he has completely developed in his own mind a murderous purpose, and has done all that in him lay to accomplish it. I therefore think that both these objections are ill founded.

LORD DEAS.—The objection taken to this indictment is twofold, and applies both to the major and the minor propositions. As regards the major proposition, which in substance charges an attempt to administer poison with the intent of committing murder, or with the intent of committing great bodily injury, I have no doubt at all, any more than your Lordship, that the attempt to administer poison with either of these views is a crime according to the law of Scotland. It has always, I think, been so held, and it is common sense that it should be so. So much for the major proposition.

But the more important question relates to the minor proposition, namely, whether, assuming that such an attempt as I have mentioned is a crime in law, the facts set forth in the minor amount to that offence? Now, the facts stated just come to this,—that the panel mixed in a quantity of oatmeal this strychnia or other deadly poison, and that he gave it to the woman (Mrs. Tumbleson) named in the indictment, directing and instructing her to give it (that is to say, the meal containing the poison) to his wife, ‘in order that it might be partaken of by her as an article of food.’ Now I can have no doubt that if the wife had partaken of the oatmeal and died, the panel would have been guilty of murder. I recollect a case from Dundee conducted by myself as Advocate-Depute, in which the circumstances were very analogous. There the man (Leith I think was his name) was indicted in the High Court for the murder of his wife by means of poison. The mode of administration libelled was the mixing the poison with a quantity of oatmeal, and leaving the oatmeal in a place where he expected his wife would find it and use it, which she did, and consequently died. The panel was convicted and executed. Here, as there, the panel, if what he said is true, had done his part. He had mixed the poison with the meal, and given it to a third party, to be handed to his wife, intending and expecting that she would partake of it as food. If the woman to whom the panel gave the meal had done what he intended her to do, and his wife had used the meal, his alleged purpose would have been accomplished; and it was not owing to him, so far as we can see, that these results did not follow. Now, it would be a sad state of the law, if, after a man has done all which it lies with him to do to poison his wife or anybody else, and put the result beyond his own power, but through some providential cause over which he had no control, the result intended does not follow, it should be held that the law cannot take cognizance of what has been done

No. 93.
Samuel
Tumbleson.
Perth.
Sept. 17.
1863.
Attempt to
Murder by
Poison.

No. 93.
Samuel
Tumbleson.
Perth.
Sept. 17.
1863.
Attempt to
Murder by
Poison.

with a view to punishment, but must allow him to repeat the attempt with impunity as often as he pleases, until he ultimately succeeds. I cannot hold this to be the law of this country. I need only add that I agree with your Lordship that the Statute 10th Geo. IV. does not affect the common law, but leaves it as it was before. I therefore hold the libel relevant.

The objections were therefore repelled, and the case went to trial. The jury returned a verdict of Not Proven, and the panel was dismissed from the bar.

HER MAJESTY'S ADVOCATE—*Thoms A.D.*

AGAINST

ANDREW GRANGER—*Sellar.*

STATUTE 9TH GEO. IV. c. 69 (Night-Poaching Act)—EVIDENCE—PREVIOUS CONVICTION.—*Observed* by Lord Deas in charging the Jury in a prosecution for breach of the Night-Poaching Act, 9th Geo. IV. c. 69, (1.) That, where several persons are out in company for the purpose of taking or destroying game, and only one of them is armed, the rest who are unarmed are liable to be convicted under the Act; (2.) That, in a case of poaching, previous convictions are relevant articles of evidence for the Jury, in determining whether the purpose for which a panel unlawfully entered land was to take or destroy game.

No. 94.
Andrew
Granger.
Perth.
Sept. 17.
1863.
Night-
Poaching.

ANDREW GRANGER was charged with contravention of the first section of the Night-Poaching Act (9th Geo. IV. c. 69)—

IN SO FAR AS, you the said Andrew Granger did, by night, that is to say, between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise, on the night of the 3d or morning of the 4th day of July 1863, or on some other night or morning of one or other of the days of that month, or of June immediately preceding, or of August immediately following, unlawfully enter, or were unlawfully in a wood or plantation, the property of the Right Honourable the Earl of Camperdown, situated in the united

parishes of Liff and Benvie, and county of Forfar, and which wood or plantation extends northwards, along the west side of a road called the Templeton Road, from a point on the turnpike road leading between Dundee and Coupar-Angus, about four miles or thereby from Dundee, armed with a net or other instrument, for the purpose of taking or destroying game: And you the said Andrew Granger have, and had previous to the date of the statutory crime and offence above libelled, twice before offended against the provisions of section first of the said statute, or one or more of them: And you have been twice previously convicted of the said statutory crime or offence.

No. 84
Andrew
Granger.
Perth.
Sept. 17.
1863.
Night-
Poaching.

The case went to trial, and the evidence showed that, early on the morning of 4th July 1863, the panel was found trespassing on the land libelled in company with another man, John Cameron; that Cameron alone was seen using a net; and that the panel when apprehended had no net in his possession. It further appeared that, for his part in this affair, Cameron was charged before the Sheriff (this being his second offence under the Act), and convicted on his own confession.

SELLAR, for the panel, contended that the charge was not made out, there being no evidence that the panel was on the land libelled 'armed with a net or other instrument, for the purpose of taking or destroying game.'

LORD DEAS, in charging the jury, observed that it was not necessary, in order to warrant a conviction under the Act, that the party charged with contravening it be found in actual possession of a net or other instrument. For instance, if two or more persons in company went upon land where they had no right to go, for the common purpose of taking or destroying game, the fact that only one of them was armed would not free the others who were unarmed from liability. And so, in the present case, if the jury were satisfied that the panel was in company with the man Cameron on the occasion libelled, the circumstance that he was not seen using a net would not be a sufficient ground for acquitting him. His Lordship also remarked, in reference to the previous convictions recorded against the panel,

that they were matters of evidence to which the jury were entitled to look, in determining whether the panel went into the plantation 'for the purpose of taking or 'destroying game.'

HER MAJESTY'S ADVOCATE—*Thoms A.D.*

AGAINST

ROBERT SMITH—*Morison.*

ATTEMPT TO BREAK PRISON—INDICTMENT—RELEVANCY.—An objection to an indictment, which charged, *inter alia*, 'the attempting to 'break prison,' that this was not a crime known to the law of Scotland—*repelled.*

No. 85.
Robert
Smith.

ROBERT SMITH was indicted and accused—

Perth,
Sept. 17.
1863.
Attempt
to Break
Prison, &c.

THAT ALBERT, by the laws of this and of every other well-governed realm, Theft, especially when committed by means of Housebreaking, and by a person who has been previously convicted of theft; as also Attempting to Break Prison; as also Assault, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Robert Smith are guilty of the said crime of theft, aggravated as aforesaid, actor, or art and part; and of the said other crimes above libelled, or one or other of them, actor, or art and part.

The minor proposition then set out the particulars of two charges of theft by housebreaking, The narrative referring to the charge of attempting to break prison was as follows:

LIKEAS (3.) you the said Robert Smith having been lawfully incarcerated in the prison of Dunblane until liberated in due course of law, in virtue of a warrant by the Sheriff-Substitute of Perthshire, dated the 20th June 1863, pronounced in a petition at the instance of Thomas Barty, Procurator-fiscal of Court for the public interest, charging you with the crime of theft by housebreaking first above libelled; and you being, time hereinafter libelled, confined in the said prison in virtue of the said warrant, and James M'Ewan, then and now or lately keeper of the said prison, and residing there, having

temporarily removed you from the cell in which you were confined to the airing-room, situated on the upper or third floor of the said prison, you the said Robert Smith did, on the 2d day of July 1863, or on one or other of the days of that month, or of June immediately preceding, or of August immediately following, wickedly and feloniously, attempt to break out of the said prison, and this you did by rushing out of the said airing-room and locking the said James M'Ewan therein, and taking possession of the key thereof, and proceeding down stairs to the second floor of the said prison, where your progress was for a time barred, you having been met by Margaret Lamb or M'Ewan, wife of, and then or now and lately residing with, the said James M'Ewan, whom you violently assaulted, and attempted to force into the passage leading to the cells on the said second floor, and whom you ultimately succeeded in forcing and locking into the store-room on the said upper or third floor; and by your thereafter proceeding down the stairs leading to the prison yard, with the view and intention of opening the wicket-door in the main door of the prison yard, and of the key of which wicket you had feloniously possessed yourself, and of thus obtaining access to the outer street, and in this way escaping from the said prison; and at or near the foot of the said stairs your further progress was arrested by Archibald Bennet, wright, then and now or lately residing at Dunblane, who hearing cries for assistance from the said Margaret Lamb or M'Ewan scaled the prison walls by means of a ladder, and succeeded in preventing your further escape.

No. 85.
Robert
Smith.
Perth.
Sept. 17.
1863.
Attempt
to Break
Prison, &c.

MORISON, for the panel, objected to the relevancy that attempting to break prison was not a relative charge by the law of Scotland, but the Court repelled the objection, and held the libel relevant.¹

HER MAJESTY'S ADVOCATE—*Thoms A.D.*

AGAINST

HENRY IMRIE.—*Morison.*

FORGERY—USING AND UTTERING—OBLIGATORY WRITING—INDICTMENT—RELEVANCY—AMENDMENT.—*Question*, whether the using and uttering as genuine a forged letter or other document, not being

¹ See the case of *Robert Gallie, jun.*, High Court, April 2, 1832, *Scottish Jurist*, vol. iv. p. 409.

No. 86.
Henry
Imrie.

Perth.
Sept. 18.
1863.

Forgery.

an obligatory writing, is a relevant charge? (2.) Circumstances in which the Court allowed a libel to be amended, by deleting certain words in the major proposition.

HENRY IMRIE was charged with forgery, as also the wickedly and feloniously using and uttering as genuine any forged Bill of Exchange or other obligatory writing, or any letter or other document having thereon any forged subscription, knowing the same to be forged.

After narrating the forgery of a bill of exchange, the minor proposition of the indictment proceeded—

LIKEAS (2.) you the the said Henry Imrie did, time and place first above libelled, wickedly and feloniously, forge and adhibit, or cause or procure to be forged and adhibited, upon a letter or obligatory writing, or other document, in the following or similar terms:—

‘ Cupar 17 September 1862

‘ Geo Hogarth Esq

‘ Agent for Commercial Bank

‘ of Scotland

‘ Cupar

‘ Sir

‘ Having of this date granted a Bill for Three hundred pounds at
‘ 1⁴/₄ to you personally we hereby declare that said Bill is granted
‘ and is to be considered as a guarantee by us for payment of any
‘ sums not exceeding that amount and interest that may from time to
‘ time be advanced by the Commercial Bank of Scotland, by way of
‘ overdraft on the deposit account kept by me Henry Imrie Farmer
‘ Brotus with the said Bank at its Branch in Cupar and that notwith-
‘ standing and however often the said sum may be drawn out and
‘ again replaced or even altho’ the Account should occasionally appear
‘ with a sum at its credit, the said bill being intended by us as a con-
‘ tinuing obligation and to remain in full force until delivered up,
the subscription ‘ David Imrie,’ or a similar subscription, as one of
the granters thereof or parties thereto, intending the same to pass for
the genuine subscription of David Imrie above designed, or of some
other person to the prosecutor unknown, or the same being a wholly
fictitious subscription: FARTHER, you the said Henry Imrie having
subscribed your own name upon the said letter or obligatory writing
or other document, as another granter thereof, or party thereto, did,
on the 23d day of September 1862, or on one or other of the days of
that month, or of August immediately preceding, or of October imme-
diately following, in or near the said office or premises in or near
Cupar, then and now or lately occupied by the Commercial Bank of

Scotland, or by the said George Hogarth, its agent, wickedly and feloniously, use and utter, as genuine, the said letter or obligatory writing, or other document, having thereon the forged subscription last above libelled, you well knowing the same to be forged, by then and there delivering the same, as genuine, or causing or procuring the same to be delivered, as genuine, to the said George Hogarth, in order that the same might be held by him as explanatory or declaratory of the footing upon which the bill therein mentioned was to be held by the said George Hogarth as agent aforesaid, and the said letter or obligatory writing, or other document, was then and there so received, and held by the said George Hogarth accordingly.

No. 86.
Henry
Imrie.
Perth.
Sept. 18.
1863.
Forgery.

MORISON, for the panel, objected to the words in the major 'or any letter or other document having thereon 'a forged subscription,' on the ground that the letter was not libelled as an obligatory writing, and if it were not an obligatory writing, the using and uttering it, though forged, was not a relevant charge.

LORD DEAS was rather inclined to sustain this objection ; but suggested that the difficulty might be obviated by deleting the words 'or any'—both he and Lord Neaves being of opinion that the statement in the minor made it evident that the letter libelled on was of an obligatory nature.

The Advocate-Depute accordingly craved leave to delete the words 'or any,' in the major proposition, which having been granted, the case went to trial. The panel was found guilty, and sentenced to four years' penal servitude.

Judges—LORDS COWAN AND ARDMILLAN.

HER MAJESTY'S ADVOCATE—*Crichton A.D.*

AGAINST

JOHN BURNS AND OTHERS—*J. C. Smith—J. R. Davidson.*

NIGHT POACHING—STATUTES 9TH GEO. IV. c. 69, AND 8TH VICT. c. 29,
—INDICTMENT—RELEVANCY—Objection to the relevancy of a charge
of night poaching, under the Act 9th Geo. IV. c. 69, and sup-

plementary Act 7th and 8th Vict. c. 29. in respect that the provisions of the latter Act did not extend or apply to the section of the former Act libelled on, *sustained*.

No. 87.
John Burns
and Others.

Perth.
April 23.
1863.

Night
Poaching.

JOHN BURNS, ROBERT EWAN, DAVID STENHOUSE, and ANDREW STEWART were charged with contravention of the 9th section of the Night Poaching Act, 9th Geo. IV. c. 69,¹ and of the 1st section of the supplementary Act, 7th and 8th Vict. c. 29,

IN SO FAR AS YOU, the said John Burns, Robert Ewan, David Stenhouse, and Andrew Stewart, did, all and each or one or more of you, in company to the number of three or more together, by night, that is to say, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, on the night of the 7th, or morning of the 8th January 1863, or on some other night or morning of that month or of December immediately preceding, or of February immediately following, unlawfully enter, or were in, a wood

¹ Section 9 of the Night Poaching Act provides—‘That if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour, and being convicted thereof before the Justices of Gaol Delivery, or of the Court of Great Sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the Court, to be transported beyond seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner.’

By section 1 of the Act 7th and 8th Vict. c. 29, it is enacted—‘That from and after the passing of this Act all the pains, punishments, and forfeitures imposed by the said Act [9th Geo. IV. c. 69] upon persons by night unlawfully taking or destroying any game or rabbits in any land, open or enclosed, as therein set forth, shall be applicable to, and imposed upon, any person by night unlawfully taking or destroying any game or rabbits on any public road, highway or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or enclosed.’

or plantation called or known as the Broken Brae Plantation, forming part of the lands or ground of Fordel, belonging to, and now or lately occupied by, George William Mercer Henderson, situated in the parish of Dalgetty, and shire of Fife, *or were unlawfully on or near the private road called the old waggon road, situated on the said estate of Fordel, in the Parish and shire aforesaid,* for the purpose of taking or destroying game or rabbits, you, the said John Burns, Robert Ewan, David Stenhouse, and Andrew Stewart, being each, or one or more of you, then and there armed with a gun or other firearms, or some other offensive weapon or weapons.

No. 87.
John Burns
and Others.
Perth.
April 23.
1868.
Night
Poaching.

Counsel for the panels objected that the indictment was irrelevant, in respect that the provisions of the Act 7th and 8th Vict. c. 29, applied only to the case of persons 'by night unlawfully taking or destroying game' in the places there specified, and did not extend or apply to the 9th section of the previous Act (9th Geo. IV. c. 69), which dealt exclusively with the case of persons 'by night unlawfully entering or being on 'land, for the purpose of taking or destroying game.'

The objection was sustained.

Upon the motion of the Advocate-depute the Court allowed the libel to be amended by deleting the charge of contravening the 1st section of the Act 7th and 8th Vict. c. 29, and the words in the minor proposition printed in italics.

The case went to trial on the amended libel. The jury by a majority returned a verdict of Not proven, and the panels were dismissed from the bar.

SOUTH CIRCUIT.

JEDBURGH.

Sept. 8.
1863.*Judge*—LORD JERVISWOODE.HER MAJESTY'S ADVOCATE.—*Crichton A.D.*

AGAINST

JOHN BURNSIDE AND HANNAH SANDERSON OR BURNSIDE.—*M'Kie.*

PANEL—*MISNOMER*—INDICTMENT.—Circumstances in which an objection that the panel was wrongly named in the indictment was repelled after a proof.

No. 88.
John and
Hannah
Burnside.

Jedburgh.
Sept. 8.
1863

Theft, &c.

JOHN BURNSIDE and HANNAH SANDERSON or BURNSIDE, his wife, were charged with eight acts of theft, or of reset of theft, from the Hawick Station of the North British Railway.

Before pleading, M'KIE, on behalf of the female panel, objected to the indictment in so far as she was therein designed Hannah Sanderson or Burnside, when her true name was Hannah Sanders or Burnside.

The ADVOCATE-DEPUTE stated in reply, that the name in the indictment was the name she had given in her declaration, and offered to prove it by the declaration of witnesses.

Counsel for the panel objected to this course being followed in the present case, because he had certain objections to the declaration, which, if sustained, would have the effect of throwing it out; and if the declaration were cast, he argued that the prosecutor could not use it, even to the extent of ascertaining the name which the panel had given to the magistrate.

LORD JERVISWOODE allowed a proof of the declaration. Mr. Russell, the magistrate who took the declaration, on being examined stated, that, looking at the name in the declaration, he was satisfied it was the name given up by the panel when examined before him; but, apart

from the declaration itself, he could not be positive of that fact. Mr. Oliver, the Sheriff Clerk's Depute, gave evidence similar to that of Mr. Russell.

LORD JERVISWOODE repelled the objection to the indictment, and the panels having pleaded not guilty, the case went to trial.

At the close of the case for the prosecution, the Advocate-Depute proposed to read the declaration of the female panel, when her counsel objected to his doing so, in respect that in the declaration certain articles were stated to have been shewn to the panel, in regard to which she had been interrogated, but which had not been produced at the trial. Lord Jerviswoode sustained this objection, and the declaration was withdrawn.

After a long trial, the jury by a majority found the libel against the female panel not proven, and she was dismissed from the bar.

The male panel was convicted of six charges of theft, and sentenced to fifteen months' imprisonment.

No. 88.
John and
Hannah
Burnside.

Jedburgh.
Sept 8.
1863.
Theft, &c.

A Y R.

Sept. 16.
1863.

Judge—LORD ARDMILLAN.

HUGH WYLLIE, Appellant—*Arthur*,

AGAINST

JAMES LAWSON OR CLOWSON, Respondent—*Deas*.

APPEAL—COMPETENCY—STATUTES 20TH GEO. II. C. 43, AND 1ST VICT. c. 43 (Sheriff Small Debt Act)—DILIGENCE—POINDING—SIST—PROCEDURE.—After a poinding has been enacted it is incompetent to grant a sist of execution on a small debt decree.

(2.) Objection to a Circuit Court Appeal that the copy appeal and relative bond of caution were not signed by the appellant—repelled.

No. 89.
Wyllie v.
Lawson.

THIS appeal arose out of the following circumstances :
In November 1862, Hugh Wyllie, draper, Kilmarnock, raised an action in the Sheriff Small-Debt Court at Ayr against James Lawson or Clowson, miner, Waterside,

Ayr.
Sept. 16.
1863.
Appeal.

No. 89.
Wyllie v.
Lawson.

Ayr.
Sept. 16.
1863.

Appeal.

for the sum of 14s. 5½d. At the first calling of the case, on 27th November, both parties being present, the Sheriff, after hearing parties, continued the case to 4th December. On that day, both again being present, after hearing parties and some witnesses, there was a further adjournment to 11th December. At this last diet the defender did not attend, and the pursuer, in the absence of the defender, obtained decree against him for the sum sued for, and expenses. On the following day a charge for payment was given, and the charge having expired, a poinding of defender's effects was executed. On 10th January, however, before a sale had followed on the poinding, the defender applied for and obtained, under section 16th of the Sheriff's Small-Debt Act, a warrant sisting execution (as if the pursuer's decree had been one in absence), and citing the present appellant to appear in Court on the 22d of January 1863. The Sheriff, after several hearings and adjournments, at length, on 5th March, reponed the defender, and sustained the sist ; and on 9th April thereafter pronounced a decision assoilzieing the defender and finding the appellant liable in expenses. Against these latter decisions the present appeal was taken.

In support of the appeal it was contended—(1.) The small debt action having been duly called and entered upon by the parties at two successive diets, the decree obtained by the appellant on the 11th December was not, in the sense of the Statute, a decree in absence, against which the respondent was entitled to be reponed. (2.) The Act allowed a sist only 'before implement of' the decree had followed thereon.' Assuming, then, for the sake of argument, that the decree in question was one in absence, still the sist was incompetent, not having been obtained till after execution of the poinding—*Rowan v. Mercer*, May 12, 1863, *above* p. 377.

DEAS, for the respondent, admitted that, after the decision in *Rowan v. Mercer*, he could not maintain the competency of the sist granted in the inferior Court,

but contended that the present appeal was open to two technical objections, founded upon the 34th and 35th sections of the Statute (20th Geo. II. c. 43), regulating appeals to the Circuit Court. These objections were to the effect that the copy appeal and relative bond of caution were signed, not by the appellant himself, but the former by the agent for the appellant, and the latter by the cautioner in the bond. He therefore asked the Court to dismiss the appeal, and remit the case to the Sheriff.

No. 89.
Wyllie v.
Lawson.

Ayr.
Sept. 16.
1863.

Appeal.

LORD ARDMILLAN said he thought it had already been decided that a notice given by the agent of an appellant to the agent of the opposite party was a good notice; and, at all events, as the Statute recognised an agent as a proper recipient of a notice of appeal, it was only reasonable to conclude that an agent was also a proper giver of the notice. As to the bond of the caution, the meaning of the Act was not that the appellant himself (as principal) should sign the bond, but that he should have the caution. In regard to the competency of a sist of the decree in the present case, it was unnecessary to determine whether the decree was properly one in absence, for it had been expressly decided, in the case of *Rowan v. Mercer*, that after a poinding it was not competent to grant a sist. The appeal must, therefore, be sustained.

Appeal sustained.

W. F. McCUBBIN, Writer.—G. MORRIS, Writer.—Agents.

WEST CIRCUIT.

Oct. 5.
1863.

GLASGOW.

Judges—LORDS JUSTICE-CLERK AND COWAN.

JAMES GALLOWAY, Appellant—*Balfour*.

AGAINST

JOHN SOMERVILLE, Respondent—*Couper*.

POACHING—STATUTES 13TH GEO. III. c. 54, AND 25TH AND 26TH VICT. c. 114—*RES JUDICATA*.—A person who had been acquitted in a Justice of Peace Court, of a charge under the Poaching Act 25th and 26th Vict. c. 114, sect. 2, was afterwards charged before the Sheriff with contravention of the Preservation of Game Act, 13th Geo. III. c. 54, sect. 3. The two complaints were at the instance of different prosecutors, but the facts founded on in each were substantially the same. In bar of trial upon the second complaint, the accused pleaded *res judicata*, and this plea was sustained by the Sheriff.—Held, on appeal to the Circuit Court of Justiciary, that the plea of *res judicata* was not well founded, in respect that the offence with which the man was charged before the Sheriff was different from that of which he had been acquitted by the Justices.

No. 90.
Galloway v
Somerville.

Glasgow.
Oct 5.
1863.

Appeal.

IN May 1863, Donald M'Donald, constable in the Dumbartonshire constabulary, presented a complaint in the Justice of Peace Court at Dumbarton, setting forth that John Somerville, miner, had been guilty of a contravention of the Poaching Act, 24th and 25th Vict. c. 114, sect. 2.

IN SO FAR AS, upon Thursday the 12th day of February 1863, or about that time, he was found upon the public road commonly called the 'Old Road,' leading from the village of Duntocher to or towards the village of West Kilpatrick, and upon that part of the said road which is in the parish of West Kilpatrick aforesaid, and twenty yards or thereby to the west of the Roman Catholic chapel of Duntocher, having in his possession two or thereby ounces of led pellets or shot, the same being engines for killing or taking game, and also having

in his possession game, viz. a hare, which game he had obtained by unlawfully going on land in search or pursuit of game, on or about the said 12th day of February 1863, the particular land being to the prosecutor unknown.

No. 90.
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1863.

Appeal.

The Justice found the charge not proven, and dismissed the complaint.

Subsequently, in June 1863, Somerville was charged before the Sheriff of Dumbartonshire, upon a complaint at the instance of James Galloway, assistant gamekeeper to Lord Blantyre, with contravention of the Preservation of Game Act, 13th Geo. III. c. 54, sect. 3 :—

IN SO FAR AS, upon the 12th day of February 1863, or about that time, and upon the road in the village of Duntocher in the parish of West Kilpatrick and county of Dumbarton, commonly called the 'Old Road,' and upon that part of said road which is twenty yards or thereby to the east of the Roman Catholic chapel of Duntocher, he did carry a hare, the said John Somerville not being qualified to kill game in Scotland, and not having the leave or order of a person qualified to kill game in Scotland for carrying said hare, and the said offence is his first offence.

In bar of trial upon this complaint Somerville pleaded '*res judicata*, in respect the same *species facti* have been already *sub judice* before the Justice of the Peace for this county.'

The Sheriff-substitute (Steele) pronounced this interlocutor :—

'Dumbarton, 18th June 1863.—The Sheriff-substitute having considered the objection stated in bar of trial, in respect that the defender has been already tried before the Justices on the same *species facti* and acquitted, sustains the objection stated on this ground, assolzies and dismisses him from the bar, and decerns.'

Against this judgment an appeal was taken to the Circuit Court of Justiciary at Glasgow.

BALFOUR, for the appellant, argued—Prosecutions under the Game Acts were not proper criminal prose-

No. 90.
Galloway v.
Somerville.

Glasgow.
Oct. 5.
1863.

Appeal.

cutions. The rule, therefore, that a party must not be twice subjected to trial on the same *species facti*, did not apply. But, besides, there was no ground in the present case for the plea of *res judicata*. The two complaints upon which the respondent was charged were at the instance of different prosecutors, and were presented in different courts. The offence charged, and the evidence relied on for a conviction, was also different in each case. Thus neither the parties nor the *media concludendi* were the same.

COUPER was for the respondent.

THE LORD JUSTICE-CLERK said he was clearly of opinion that the judgment of the Sheriff, sustaining the plea of *res judicata*, was unsound. The charge upon which the respondent was acquitted, was a charge under the second section of the Poaching Act of 1862. That section had sometimes been misunderstood, and of this the present case afforded an example. Under that section the possession of game was no doubt the fact upon which Constables and Peace-officers were to proceed in seeking a conviction, but the offence for which a party was to be prosecuted was not the having game in his possession, but the unlawfully going on land, and there killing or taking game. But the charge under the 13th Geo. III. c. 54, was quite different. The offence there consisted in carrying a hare or other game without having the proper qualification. There was nothing, therefore, inconsistent in the respondent being acquitted of the first charge and convicted of the second, the prosecutions depending upon entirely different facts and different evidence.

LORD COWAN concurred.

Appeal sustained.

W. BASTIE, Writer, Dumbarton—J. COLQUHOUN, Writer, Dumbarton—Agents.

Judges—THE LORD JUSTICE-CLERK AND LORD COWAN.

JOHN PURDIE, Appellant—*J. D. Grant*.

AGAINST

ROBERT GLASSFORD MITCHELL, Respondent—*Maclean*.

APPEAL—STATUTE 25TH AND 26TH VICT. C. 35 (Public Houses Acts Amendment) — JURISDICTION — JUSTICE OF PEACE — QUARTER SESSIONS—CONVICTION.—An appeal taken from a decision of Justices of Peace in Quarter Sessions to the Court of Justiciary—held incompetent under the 33d and 34th Sections of the Public Houses Acts Amendment (Scotland) Act, 1862.

THE appellant, who was proprietor of the Arrochar House Hotel, Arrochar, had been convicted by the Justices of the Peace for the county of Dumbarton, sitting in Petty Sessions, of a breach of his certificate, upon a complaint at the instance of the respondent, the Procurator-Fiscal of the county. Upon appeal to the Justices in Quarter Sessions the conviction was affirmed. Against this decision the present appeal was taken to the Circuit Court of Justiciary at Glasgow, under the Public Houses Acts Amendment Act.¹

No. 91.
Purdie v.
Mitchell.
Glasgow.
Oct. 6.
1863.
Appeal.

¹ The Statute 25th and 26th Vict. c. 35, provides by section 33, that 'It shall be competent for any person conceiving himself aggrieved by any warrant, sentence, order, decree, judgment, or decision, made or given by any Sheriff, Justice or Justices of the Peace, or Magistrate, in any cause, prosecution, or complaint, raised under the authority of the recited Acts or of this Act, for breach of certificate, or for trafficking in spirits, or other exciseable liquors, without a certificate, to bring the case by appeal before the next Circuit Court of Justiciary, or where there are no Circuit Courts, before the High Court of Justiciary at Edinburgh, in the manner, and by and under the rules, limitations, conditions, and restrictions which shall from time to time be prescribed by the said High Court of Justiciary. . . . Provided always, that nothing herein contained shall

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1863.

Appeal.

MACLEAN, for the respondent, objected to the competency of the appeal. He contended—the appellant has lost his right of appeal under the Public Houses Acts. Admitted that he might have taken the original Justice of Peace conviction by appeal to the Justiciary Court, but having chosen to go, in the first instance, to the Quarter Sessions, he is not now entitled to have his case reviewed a second time. The power of appealing to the Justiciary Court, conferred by the Act of 1862, does not extend to decisions of the Quarter Sessions, which, indeed, are by section 34 expressly excluded from every form of review.

GRANT, for the appellant, answered—The policy and intent of the recent Act is to extend the range of summary appeals, so as to limit recourse to the Court of Session. That policy would be defeated, if effect were given to the contention of the respondent. The recent Act makes it competent to appeal from decisions of ‘any Justice or Justices of the Peace.’ These words are not specific, but general, and apply to all Justices, whether sitting in Petty or in Quarter Sessions. But the competency of the present appeal is placed beyond doubt by the concluding clause of section 33, which provides ‘that nothing herein contained’—the institution of a new Court of appeal—‘shall be held to exclude ‘or interfere with the right of appeal to Quarter Sessions, ‘which at present exists.’

The LORD JUSTICE-CLERK said that the question as to

‘be held to exclude or interfere with the right of appeal to Quarter Sessions which at present exists.’

Section 34 provides—‘No warrant, sentence, order, decree, judgment, or decision, made or given by any Quarter Sessions, Sheriff, Justice or Justices of the Peace, or magistrate in any cause, prosecution, or complaint, or in any other matter under the authority of the said recited Acts or of this Act, shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of execution, on any ground, or for any reason whatever, other than by this Act provided.’

the competency of this appeal turned upon the meaning to be attached to the words 'Justice or Justices of the Peace' in section 33 of the Act. Looking to the way in which these words were used in other parts of the Act, and especially in section 34, he had no doubt that they were here intended to apply only to Justices sitting in Petty Sessions. He was therefore of opinion that the appeal was incompetent, and ought to be dismissed.

No. 91.
Purdie v.
Mitchell.

Glasgow.
Oct. 6.
1863.

Appeal.

LORD COWAN, with some hesitation, concurred.

The Court dismissed the Appeal.

JOHN MURRAY, S.S.C.—A. ALISON, Writer, Glasgow.—Agents.

HIGH COURT.

Present,

Dec. 7.
1863.

THE LORD JUSTICE-CLERK.

LORDS COWAN, DEAS, NEAVES, AND JERVISWOODE.

HER MAJESTY'S ADVOCATE—*Lord Advocate Moncreiff*—
A. Moncreiff A.D.

AGAINST

MARY M'LEAN—*Watson*—*Guthrie*.

INDICTMENT—DESIGNATION OF PANEL.—The designation of a Prisoner as 'now or lately prisoner in the prison of Glasgow,' held sufficient although there was another panel indicted for the same Circuit under the same name and designation, and charged with the same crime.

At the Glasgow Autumn Circuit 1863, MARY M'LEAN was charged with the crime of theft, aggravated by previous conviction.

No. 92.
Mary
M'Lean.

High Court.
Dec. 7.
1863.

Theft, &c.

Counsel for the panel objected that she could not be called on to plead to the indictment which he admitted had been served on her, in respect that there are two prisoners indicted for the present Circuit for the crime of theft, aggravated by previous conviction, under the same name and designation, (Mary M'Lean, now or lately prisoner in the prison of Glasgow,) and that in these circumstances the designation of the prisoner in the libel is insufficient.

No. 92.
Mary
M'Lean.
High Court
Dec. 7,
1863.
Theft, &c.

It was admitted by the Advocate-Depute that two persons of the same name are indicted for the crime of theft, aggravated by previous conviction under separate indictments, and that in each of these indictments the prisoner is named and designed 'Mary M'Lean, present prisoner in the prison of Glasgow.'

In respect of the said objection the Lord Justice-Clerk and Lord Cowan certified the case to the High Court of Justiciary.

The diet was called on the 23d November, when—

WATSON and GUTHRIE for the panel—The objection was that the panel was designed merely as now or lately prisoner in the Prison of Glasgow, while there were two prisoners to whom that designation applied. Great hardship might accrue to the prisoner in consequence of this vagueness. There was nothing on the face of the indictment to show that it was meant for the one prisoner rather than the other, and the mistakes to which it might lead were obvious. There might be service of the wrong indictment, the wrong individual might be brought up, or the wrong declaration might be read. He submitted that in the specialities of this case the designation was not such as to meet the requirements of the law, in fact, in the present case the wrong prisoner was twice placed in the dock at the Glasgow Court. The principle of this objection was recognised in the law of Scotland, and had been laid down in a number of cases. He referred to Hume, vol. ii. p. 157-159; Forbes' Institutes, vol. ii. p. 321; and to the cases of *John Fraser*, High Court, Nov. 14, 1744, Hume, vol. ii, p. 160; *John Robertson*, Glasgow, April 1824, Shaw's Justiciary Reports, p. 123; *John Carruthers*, Dumfries, Sept. 15, 1827; *ibid*, p. 212; *Thomas Robertson*, Glasgow, Sept. 29, 1827, Swinton, vol. i. p. 547; *John Wilson and others*, May 23, 1831, Bell's Notes to Hume, p. 170.

The LORD-ADVOCATE and A. MONCRIEFF, for the prosecution, maintained that the prosecutor in this case had

done all that he was bound to do. In the first place, the designation in this indictment was a good designation for the purposes of prosecution. The designation of a prisoner in an indictment did not require to be a designation in the sense in which that term was used in regard to a witness or a person who was to be discovered by the designation or description. It was quite enough if the designation was correct, so that the prisoner might not say, 'This indictment does not apply to me.' It was not essential that the indictment should be such as that anybody might be able to say to whom it applied. It was enough that it was correct. Therefore the designation 'Mary M'Lean, now or 'lately prisoner in the Prison of Glasgow,' was sufficient to this extent, that the indictment being served upon the prisoner, she could not say that it did not apply to her. If that was so, what was the weight of the objection that there was another person to whom that might apply? It was an important subject, and the circumstance might come to be very material at the trial, but only if when the prisoner was called to plead she said 'I never was served with that indictment.' If the wrong Mary M'Lean was served with the indictment she was not bound to plead guilty; but there was an obligation on the prosecutor not only to serve the indictment but to prove that it had been served. The indictment was served upon the proper person, and it did not appear she knew there was another Mary M'Lean in the prison at the time. The real difficulty arose not upon the indictment, but upon the serving of it. It was necessary that the prosecutor should prove the service; but the designation, however general, if accurate, was quite sufficient.

They cited the cases of *John O'Neill*, High Court, June 2, 1851, J. Shaw, p. 483; and *Craig*, Glasgow, Sept. 28, 1858, referred to in *Longmuir v. Baxter*, High Court, Nov. 29, 1858, Irvine, vol. iii. p. 292.

At advising of this date the opinion of the Court was pronounced by

No. 92.
Mary
M'Lean.
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Dec. 7.
1863.
Theft, &c.

No. 92.] The LORD JUSTICE-CLERK.—The Court have taken
Mary time to consider this case, because it involves a point of
M'Lean. considerable practical importance, and is not without
High Court. difficulty.
Dec. 7.
1863.

Theft, &c.

The objection which was taken at the Glasgow Circuit was stated in this way—that there are two prisoners indicted for the present Circuit for the crime of theft, aggravated by previous conviction, under the same name and designation, (Mary, M'Lean, now or lately prisoner in the prison of Glasgow), and that in these circumstances the designation of the prisoner in the libel is insufficient. The facts upon which this objection is rested are admitted by the Public Prosecution, and the question is whether, in the circumstances, the designation 'now or lately prisoner in the prison of Glasgow,' as applicable to the panel Mary M'Lean, is a sufficient designation. The Court are unable to distinguish on principle between this case and that of *O'Neill*. In that case, as in this, two persons of the same name were indicted for trial at the same Circuit under the same designation. The only specialities that have been suggested as distinguishing the case of *O'Neill* from the present are, that one of the prisoners, *John O'Neill*, was charged with theft, and was charged alone in the indictment, while the other prisoner, *John O'Neill*, was charged with assault, in an indictment directed both against him and against another person of the name of Quin. But it seems to the Court that these specialities do not derogate from the authority of the case of *O'Neill*. They think that the nature of the crime charged and the number of persons included in the indictment have nothing to do with the sufficiency of the designation, and that if *John O'Neill* designed as 'now or lately prisoner in the Prison of Glasgow' did not serve to distinguish him in the indictment, the addition of the circumstances alluded to would not make it a good designation. The objection will therefore be repelled.

Present,

Dec. 14.
1863.

THE LORD JUSTICE-CLERK,

LORDS COWAN AND JERVISWOODE.

ROBERT LOGAN, Suspender—*A. Mure.*

AGAINST

MATTHEW COUPLAND, Respondent—*Gifford.*

SUSPENSION—JUSTICE OF PEACE CONVICTION—STATUTES 2D AND 3D WILL. IV. c. 68 (Day Trespass Act), 25TH AND 26TH VICT. c. 114 (Poaching Act)—OATH.—A conviction by Justices of the Peace under the Act 25th and 26th Vict. c. 114, which refers to the previous Act 2d and 3d Will. IV. c. 68, set aside, in respect that the warrant of citation did not proceed on the oath of a credible witness, in terms of the 11th section of the latter Act.

THIS was a suspension of a conviction, under the Poaching Act 25th and 26th Vict. c. 114, obtained before a Justice of Peace Court at Newton-Stewart, on a complaint at the instance of the respondent, a constable in the Wigtownshire constabulary. The ground of suspension was, that the warrant of citation did not proceed on the oath of a credible witness, as required by the 11th section of the Day Trespass Act (2d and 3d Will. IV. c. 68). The fact that no oath had been taken was admitted by the respondent.¹

No. 93.
Logan v.
Coupland.High Court.
Dec. 14.
1863.

Suspension.

¹ Section 3d of the Act 25th and 26th Vict. c. 114, provides :—
' Any penalty under this Act shall be recovered and enforced in
' England, in the same manner as penalties under the Act of 1st and
' 2d Will. IV. c. 32, and in Scotland under the Act 2d and 3d
' Will. IV. c. 68, and in Ireland under the Petty Sessions (Ireland)
' Act 1851, when not otherwise directed in this Act.'

Section 4th provides :—' The powers and provisions of the Act of
' the 11th and 12th years of her present Majesty, c. 43, shall extend
' and apply to this Act, and to all proceedings, matters, and things to
' be taken, had, and done, and to all persons to be proceeded against,
' or taking proceedings under this Act.'

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Suspension.

MURE, for the suspender—The suspender was cited before the Justices of Peace at Newton-Stewart, in the county of Wigtown, on the 25th September last. He had been served with a charge under the 25th and 26th Vict. c. 114, entitled, ‘An Act for the Prevention of Poaching.’ He was charged under the second section of the statute, which entitles any constable, after the 7th of August 1862, to search any person whom he had good cause to suspect of having game in his possession. By the 3d section of the statute it is enacted, that any proceedings brought in Scotland under this Act, shall be conducted according to the enactments and provisions contained in the 2d and 3d Will. IV. c. 68, known as the Day Poaching Act. By the 11th section of that statute it is enacted, that the prosecution for every offence punishable by virtue of that Act shall be commenced within three calendar months after the commission of the offence ; that when any person shall be charged on the oath of a credible witness with any such offence before a Justice of the Peace, the Justice may summon the party before him at any time and place. It was clear from this section that the Justice was not entitled to issue his warrant to summon the party unless he had been charged on the oath of a credible witness with the offence. This person received a citation, and the Justice’s interlocutor was as follows :—‘ The Justice ‘ having considered the foregoing petition and complaint, grants warrant to any of the constables of ‘ court to serve a copy of the same and this deliverance ‘ on the said Robert Logan personally, or at his usual ‘ place of abode ; and ordains him to appear before any ‘ two or more of her Majesty’s Justices of the Peace ‘ for the county of Wigtown, upon Friday, the 25th of ‘ September,’ &c. Now here there was no oath at all. In point of fact there was no oath ; and the interlocutor did not pretend that there was an oath. There was no reference of any kind to the fact of a credible witness having appeared before the Justice and charged the sus-

penders with any offence under the statute. It was not necessary to enter into any argument on this subject, seeing that so late as January last, the Court had decided the point of law in the case of *Trainer v. Johnston*, High Court, Jan. 5, 1863, Irvine, vol. iv. p. 264. The point decided by that case was, that in a prosecution raised under the 2d section of the 25th and 26th Vict., it was necessary that the offence should be charged before the Justice on the oath of a credible witness, before a citation could be issued. That judgment simply followed a long series of previous decisions.—See *Blythe and Taylor v. Robson*, High Court, June 10, 1853, Irvine, vol. i. p. 235. The statute 25th and 26th Vict. was certainly somewhat ambiguous. It made reference in the 4th clause to the English statute, and said that the powers and provisions of the Act 11th and 12th Vict. c. 43, should extend and apply to this Act. That statute bears to have been intended to facilitate the performance of duties by Justices of the Peace out of sessions in England and Wales in respect to summary convictions and orders; and by the 30th section it is enacted that nothing in this Act shall extend, or be considered to extend, to Scotland or Ireland. He therefore submitted, that the warrant of citation not having proceeded on the oath of a credible witness, as required by section 11th of the Act 2d and 3d Will. IV. c. 68, the whole consequent proceedings being irregular ought to be set aside.

GIFFORD, for the respondent, said the only point before the Court was whether to justify citation in this case a preliminary oath was required before the warrant of citation was issued. He had to submit that no oath was necessary under the statute 25th and 26th Vict., and he had further to submit that the Day Poaching Act was imported into this case in such a way as to relieve the provisions of that Act of the preliminary oath otherwise requisite. In the first place the statute of 1862 contained a substantive provision in regard to an

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No. 93. offence against the Act. The second section authorised
 Logan v. constables to search certain persons who were suspected
 Coupland. of having game in their possession. It provides power
 High Court. for seizing and detaining game, and then states that a
 Dec. 14. complaint shall be made to the Justices of the Peace ;
 1863. and if such person shall have obtained such game by
 Suspension. unlawfully going on any land in search or pursuit of
 game, or shall have been accessory thereto, such person
 shall on being convicted thereof forfeit and pay any
 sum not exceeding £5, and forfeit all the instruments
 by which the game were taken. Now suppose nothing
 had been said about the power of prosecution, there was
 nothing in the Act to show how it was to be made.
 The words were:—‘The constable or police officer
 ‘shall in such case apply to some Justice of the Peace
 ‘for a summons citing such person to appear as pro-
 ‘vided in the 18th and 19th English Act.’ Accordingly
 the suspender must get out of this Act what was neces-
 sary to empower the Justice to give the summons. He
 did so by referring to section three of the Act, to which
 he asked their Lordships to pay special attention. It
 referred to the preliminary proceedings for issuing the
 summons, and to the proceedings for the recovery of the
 penalties saying that should be recovered, enforced, and
 prosecuted for in England in the same way as penalties
 under the Act 1st and 2d Will. IV., and in Scotland
 under the Act 2d and 3d Will. IV., cap. 68. But the
 statute would be imperfect if it merely directed the
 penalties to be recovered in a certain way, and accord-
 ingly it went on in the next clause to provide for the
 whole proceedings that would take place in the prose-
 cution of the offence. It did that by the 4th section, to
 which the suspender had referred ; and provided that its
 powers and provisions should apply to this Act in all
 proceedings, matters, and things to be taken up and
 done, and to all persons to be proceeded against under
 this Act. Now it was quite true that this Act just re-
 ferred to was originally an English Act. It was passed

for the regulating of proceedings before the Justices in summary actions, in recovering penalties, and for enforcing summary convictions in England and Wales. It was true that it did not apply to Scotland; but he submitted that seeing this statute, 25th and 26th Vict., was a British statute, it imported as a part of it the English statute. It made the English statute as much a Scotch Act as if the English statute had been imported bodily into the Act.

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THE LORD JUSTICE-CLERK.—The Act 11th and 12th Vict. contains a provision, that ‘nothing in this Act shall ‘extend, or be constructed to extend to Scotland or ‘Ireland.’ Is that clause also imported into this Act?

GIFFORD.—Yes; but it must be interpreted in consistence with the enactment in section 4, which is virtually a repeal of the limiting words of the English Statute.

THE LORD JUSTICE-CLERK.—Was the procedure followed in this case that prescribed by the English Statute?

GIFFORD.—Yes.

THE LORD JUSTICE-CLERK.—Then, was the summons of citation given under the seal of the Justices as directed in Schedule A?

GIFFORD.—No; but it is only the ‘powers and provisions’ of the English Act that are extended to this Act. The direction in the Schedule was not necessarily imperative. The question now to be decided was not raised in the case of *Trainer v. Johnston*. At all events it did not appear that, in that case, any argument was addressed to the Court upon the terms of the 4th section of the Act.

MURE having been heard in reply—

LORD COWAN said—I should have been very slow to come to any other decision upon the present question than that at which the Court arrived in January last, in the case of *Trainer v. Johnston*. And had I felt any difficulty, I would have suggested that the case should be

No. 93. argued before the whole Court. As I entertain no
 Logan v. doubt, however, as to the soundness of the previous de-
 Coupland. cision, I shall content myself with making a few remarks
 High Court. suggested by the argument which we have now heard.
 Dec. 14.
 1863.

Suspension. In the first place, as to the effect of the reference, in section 4 of the recent poaching Act, to the Act 11th and 12th Vict. c. 43, regulating procedure before Justices of the Peace in England, I can give no countenance to the view contended for by the respondent, that it was thereby intended to import into our Scottish practice the forms of procedure enjoined by the English Statute,—forms with which our Justices are quite unfamiliar, and which in many essential particulars could not be carried into operation. It may have been quite proper to declare that proceedings taken in England, under the British Statute, should be conducted under the provisions of 11th and 12th Vict. But there was no necessity for this as regards Scotland, where we have an established course of summary procedure, which has been found in practice perfectly satisfactory. Besides, as was pointed out in the course of the argument, one of the provisions imported into this Act, according to the contention of the respondent, is that by which the application of this Act to Scotland is expressly excluded.

A question remains as to the direction in section 3, that penalties under this Act 'shall be recovered and 'enforced' in Scotland under the Act 2d and 3d Will. IV. c. 60. It is said that these expressions apply only to the means of getting payment of penalties already decerned for. I cannot take that view. It appears to me that the words embrace the whole proceedings under the Act from their commencement to their close. And if that be so, have we not, under 2d and 3d William IV., a full and satisfactory mode of procedure prescribed. That Act requires that a party shall not even be cited until the charge made against him has been verified by the oath of a credible witness.. This provision I regard

as a valuable safeguard for the liberty of the subject. It is also most necessary for the due administration of justice; because, by the terms of the oath, the Justice of the Peace is enabled in each case to decide whether he should issue a summons of citation, or should grant warrant for the immediate apprehension of the accused.

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Entertaining these views, I am of opinion that the conviction here cannot be sustained. The oath required by the Act 2d and 3d Will. IV. as the foundation of a prosecution has not been taken, and on that ground the proceedings are *ab initio* irregular and void.

LORD JERVISWOODE.—I am entirely of the same opinion.

The LORD JUSTICE-CLERK said, as I was one of the Judges who concurred in pronouncing judgment in the case of *Trainer v. Johnston*, I think it right to explain very shortly the grounds upon which the Court then proceeded. Mr Gifford is quite correct in saying that the 4th section of the recent statute, 25th and 26th Vict., was not cited in the case of *Trainer* against *Johnston*. The point undoubtedly was made, that the oath was not necessary because the provisions of 2d and 3d Will. IV. to that effect were not to be held as incorporated into the recent statute. Upon that point the Court gave judgment, finding that the oath was necessary as a foundation of prosecution under the recent statute. The argument rested upon the 4th section of the Act is new and deserves consideration, although I do not think it raises any serious difficulty. The Act proceeds throughout upon the principle of distinguishing between the forms of procedure in the different parts of the United Kingdom. In the leading section of the Act, as it may be called—the second—it is provided that the constable shall apply to a Justice of the Peace for a summons to cite the person to appear before two Justices of the Peace in so far as regards England and Ireland, and before a Sheriff or two Justices in Scotland. Then in the

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third section reference is made to the manner of recovering and enforcing the provisions of the statute as regards England, another as regards Scotland, and a third as regards Ireland ; and then follows the clause in question, which provides that the powers and provisions of the English statute, commonly called the Summary Prosecution Act, ' shall extend and apply to this Act, and to all proceedings, matters, and things to be taken, had, and done, and to all persons to be proceeded against and taking proceedings under this Act.' That being a purely English Act, *prima facie*, the 4th section has not the same extensive application as the other. It might have been so expressed as to have the same extensive application, because it might have provided that the powers and provisions of the English Act should apply to this Act, and to all the proceedings taken under this Act, whether in England, Scotland, or Ireland. Instead of there being anything of this kind in the fourth section, the very words of the enactment by their own intrinsic force necessarily exclude the exercise of these powers in either Scotland or Ireland, because one of the provisions of the 11th and 12th Victoria is a provision that this Act shall not extend to either Scotland or Ireland. Therefore, whether we read the clause literally or according to the fair principle of interpretation, the result is precisely the same. It is quite impossible to suppose, that there is any intention of incorporating that statute into the present Act in so far as regards proceedings in either Scotland or Ireland. There is no necessity for it, because the third section, according to my reading of it, gives all the requisite machinery for conducting prosecutions under this new Act of Parliament. It provides that any penalty under this Act shall be recovered and enforced in Scotland in the same manner as under the Act 2d and 3d Will. IV., cap 68. We are thus referred to the Day Poaching Act for the manner of recovering and enforcing the penalty. Now, when

we come to that Act of Parliament and look at the clause which regulates the manner of recovering and enforcing penalties, I cannot see the ground for doubt as to what was intended. In the first place, what was the general meaning of the term *recovering* of a penalty under an Act of this kind? It meant undoubtedly the proceedings taken for the purpose of recovering or obtaining payment of the penalty from the offender. The manner must of course be a formal prosecution—a formal action and proceeding by which that recovery is effected. Reading the third section in what appears to me its obvious and necessary meaning, we have a complete guide as to the manner in which prosecutions are to be conducted without reference to the fourth section at all. I have therefore no difficulty in concurring with your Lordships.

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Logan v.
Coupland.
High Court.
Dec. 14.
1863.
Suspension.

Conviction set aside, with expenses.

ALEXANDER GIFFORD, S.S.C.—CAMPRELL & SMITH, S.S.C.—Agents.

Present,

Dec. 18.
1863.

THE LORD JUSTICE-CLERK.

LORDS COWAN AND JERVISWOODE.

JOHN MURRAY, Suspender—*W. A. Brown.*

AGAINST

JAMES M'GILCHRIST AND THOMAS TORRANCE, Respondents—*Millar.*

SUSPENSION—STATUTE 4TH GEO. IV. c. 34, SECT. 3.—MASTER AND SERVANT—APPRENTICE.—A workman was engaged, without an indenture, to serve for five years at gradually increasing wages. Having deserted the service during the currency of the third year of his engagement, he was convicted under the 3d section of the Act Geo. IV., c. 34.—Conviction *suspended*, with expenses, on the ground that at the time when the desertion took place, the work-

man was under no binding obligation to remain in his employer's service.

Question, Whether the conviction would have been good, if the desertion had taken place during the first year of the service.

No. 94.
Murray v.
M'Gilchrist,
and Tor-
rance.

High Court.
Dec. 18.
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Suspension.

THE Suspender was in the employment of M'Gilchrist and Company, engineers and ironfounders at Coatbridge. On 13th October 1863, the respondent James M'Gilchrist, an individual partner of the firm of M'Gilchrist and Company, presented a petition and complaint to the Justices of the Peace for the County of Lanark, founded on the Act 4th Geo. IV. c. 34, sect. 3, as extended by the Act 10th Geo. IV. c. 52.¹

The 3d section of the Act 4th Geo. IV. c. 34, provides—‘ That if
 ‘ any servant in husbandry, or any artificer, calico printer, handicrafts-
 ‘ man, miner, collier, keelman, pitman, glassman, potter, labourer, or
 ‘ other person, shall contract with any person or persons whomsoever,
 ‘ to serve him, her, or them, for any time or times whatsoever, or in
 ‘ any other manner, and shall not enter into or commence his or her
 ‘ service according to his or her contract (such contract being in
 ‘ writing, and signed by the contracting parties,) or having entered
 ‘ into such service, shall absent himself or herself from his or her
 ‘ service before the term of his or her contract, whether such contract
 ‘ shall be in writing or not in writing, shall be completed, or neglect to
 ‘ fulfil the same, or be guilty of any other misconduct or misdemeanour
 ‘ in the execution thereof or otherwise respecting the same, then, and
 ‘ in every such case, it shall and may be lawful for any Justice of the
 ‘ Peace of the county or place where such servant in husbandry,
 ‘ artificer, calico printer, handicraftsman, miner, collier, keelman,
 ‘ pitman, glassman, potter, labourer, or other person shall have so
 ‘ contracted or be employed, or be found, and such Justice is hereby
 ‘ authorized and empowered, upon complaint thereof made upon oath
 ‘ to him by the person or persons, or any of them, with whom such
 ‘ servant in husbandry, artificer, calico printer, handicraftsman, miner,
 ‘ collier, keelman, pitman, glassman, potter, labourer, or other person
 ‘ shall have so contracted, or by his, her, or their steward, manager,
 ‘ or agent, which oath such Justice is hereby empowered to administer,
 ‘ to issue his warrant for the apprehending every such servant in
 ‘ husbandry, artificer, calico printer, handicraftsman, miner, collier,
 ‘ keelman, pitman, glassman, potter, labourer, or other person, and to
 ‘ examine into the nature of the complaint; and if it shall appear to

The complaint set forth—

That the said John Murray (the suspender) agreed and became bound to serve the said firm of M'Gilchrist and Company as an iron-turner for twelve months from the 31st day of December 1861 to the 31st day of December 1862, and entered their employment accordingly, and remained therein, working to them at their works at Coatbridge, aforesaid, up to the said 31st day of December 1862.

That the said John Murray not only gave no previous warning or notice whatever, in terms of the law, of any intention on his part to leave the service of the said firm M'Gilchrist and Company at the 31st day of December 1862, but signified his intention of remaining another year, and continued in their service after said 31st day of December 1862, when by tacit relocation, express agreement, or otherwise, he was bound to serve the said firm of M'Gilchrist and Company for a further period of twelve months from said last-mentioned period.

That notwithstanding the said John Murray was bound as aforesaid to serve the said firm of M'Gilchrist and Company in said capacity for a further period of twelve months from the 31st day of December 1862, he on or about the 3rd day of October current, absented himself from his said service, and has neglected to fulfil the contract come under by him as aforesaid, or has been guilty of misconduct, or a misdemeanour in the execution thereof in contravention of the Statute in part above recited, and has rendered himself liable to the punishment thereby imposed.

The suspender having been apprehended, was brought

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' such Justice that any such servant in husbandry, artificer, calico
' printer, handicraftsman, miner, collier, keelman, pitman, glassman,
' potter, labourer, or other person, shall not have fulfilled such contract,
' or hath been guilty of any other misconduct or misdemeanour as
' aforesaid, it shall and may be lawful for such Justice to commit every
' such person to the house of correction, there to remain and be held
' to hard labour for a reasonable time, not exceeding three months,
' and to abate a proportionable part of his or her wages for and
' during such period as he or she shall be so confined in the house of
' correction, or in lieu thereof, to punish the offender by abating the
' whole or any part of his or her wages, or to discharge such servant
' in husbandry, artificer, calico printer, handicraftsman, miner, collier,
' keelman, pitman, glassman, potter, labourer, or other person from
' his or her contract, service, or employment; which discharge shall
' be given under the hand and seal of such Justice gratis.'

No. 94. up for trial before the respondent, Thomas Torrance, one
 Murray v. of the Justices for the county of Lanark. Among other
 M'Gilchrist witnesses for the prosecution, John Anderson, foreman
 and Tor- to M'Gilchrist and Company deponed :—
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I engaged the defender to work in complainers' work as an
 Suspension. apprentice iron turner, for the usual period of five years. His wages
 were to be 3s. the first year, 4s. the second, and 5s. the third, and a
 further increase the last two years. I understand that he had been
 working at some other work prior to his engagement in ours, and he
 got an allowance of four months for this, in counting his first year.
 He entered our service somewhere about the 1st of June 1861. His
 second year was held to commence in January 1862, and during that
 year he received 4s. a week. At the beginning of this year he re-
 ceived 4s. a week. At the beginning of this year he got the increase
 of wages agreed upon for his third year, viz. 5s. He left his work
 without completing that year upon the first Saturday of this month,
 and he did not return to his work since.

It further appeared that the suspender was engaged
 without a written indenture.

After trial, the Justice found the suspender 'guilty
 'of the offence of desertion of service as libelled,' and
 sentenced him to imprisonment with hard labour for sixty
 days.

Having been imprisoned under this sentence, the
 suspender presented a bill of suspension and liberation,
 upon the following among other grounds :—

1. The proceedings complained of were irregular and inept, in
 respect there was no valid instance by or on behalf of Messrs.
 M'Gilchrist and Company, in whose employment the complainer was.
2. The complainer being an apprentice of the said Messrs. M'Gilchrist
 and Company, was not liable to be prosecuted for an offence under the
 third section of the first Statute libelled on.
3. The sentence com-
 plained of was irregular, and inept, in respect it proceeded upon proof
 of a contract between the present complainer and the said Messrs.
 M'Gilchrist and Company, other than the contract of service libelled
 on in said petition and complaint.

W. A. BROWN, for the suspender, referred to *Paul and
 others v. Barclay and Curle*, High Court, Nov. 24, 1856,
Irvine, vol. ii. p. 537 ; *Kennedy v. Young*, High Court,
 March 13, 1837, *Swinton*, vol. i., p. 474 ; *King v. Inha-*

bitants of Great Wishford, Nov. 1835, 4 Ad. and Ell. (1st series) 216.

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rance.

MILLAR, for the respondent, cited *King v. Inhabitants of Crediton*, May 28, 1831, 2 Barn and Ad. 493 ; *Lyle v. Service*, Court of Session, Nov. 12, 1863 ; *M'Lean v. Steele and Company* High Court, Nov. 24, 1856, Irvine, vol. ii. p. 553.

High Court.
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Suspension.

At advising—

THE LORD JUSTICE-CLERK.—This is a suspension of a conviction under the statute 4th Geo. IV. c. 34., regulating contracts between masters and workmen ; and a number of grounds were stated in the bill of suspension, but the argument was confined to three. The first of these is, that there was no title to sue the complaint, in respect that the engagement to serve was entered into with the firm of M'Gilchrist & Company, whereas the prosecution is at the instance of one of the individual partners of the firm. Now, that objection is plainly untenable, because by the terms of the Act of Parliament, any of the partners, or even the manager, is entitled to go to the Justice and make oath as to the alleged breach of contract—and making oath before the Justice is initiating the proceedings.

But then there are other two objections—(1.) That the contract libelled in the complaint is a contract of service, whereas the contract proved is a contract of apprenticeship ; and if so, it is argued that the complaint is brought under the wrong section of the statute ; and (2.) That the contract proved, and upon which the conviction proceeded, is not the contract libelled, and is not, according to the evidence—to which for the purpose of disposing of such a plea we are entitled to look—the contract which was in existence between the parties at the time when the offence is alleged to have been committed. Now, the contract libelled is an agreement to serve the firm of M'Gilchrist & Company from the 31st December 1861 to 31st December 1862, and the complaint sets forth ' that the

No. 94. ' said John Murray not only gave no previous warn-
 Murray v. ' ing or notice whatever, in terms of law, of any in-
 M'Gilchrist ' tention on his part to leave the service of the said
 and Tol-
 rance. ' firm of M'Gilchrist & Company at the 31st day of
 High Court. ' December 1862, but signified his intention of remaining
 Dec. 18. ' another year, and continued in their service after said
 1863. ' 31st day of December 1862, when by *tacit relocation*,
 Suspension. ' express agreement, or otherwise, he was bound to serve
 ' the firm of M'Gilchrist & Company for a further period
 ' of twelve months from said last-mentioned period.'
 It is not very easy to understand what the precise contract is which the complainer here alleges was the contract broken; but the foreman of the firm distinctly says that he engaged the suspender in June 1861 to serve as an apprentice for the period of five years—that no writing passed—that at the end of each year he was to get an increase of wages. From this it is plain that the contract was not a contract of apprenticeship—no such contract is valid without an indenture—and, indeed, the terms of the contract as recited by the foreman show an absence of all the characteristics that are essential to a contract of apprenticeship. If, therefore, it is not a contract of apprenticeship, we have a contract of service, and the complaint is properly presented under the third section of the statute.

Being then a workman in the employment of the complainers, the next question is, under what engagement was the suspender working when he absented himself from service. It is proved that no warning was necessary by the practice of the establishment; and, therefore, unless it can be shown that he was working under a definite time engagement, he was at liberty to go whenever he chose. The contract was a contract to serve for five years, with increasing wages at the end of each year. It was a *verbal* contract, and therefore only binding for one year. Now, the workman not only completed the first year, but he completed the year 1862, and he went on to work for a portion of the year 1863,

and the question in these circumstances is, whether, having entered on the third year's service, he was under an obligation to continue. The question is one of novelty; but after giving it my best consideration, I am satisfied that he is not bound. I think that after the expiry of the year he was no longer working under a definite time engagement. Tacit relocation is plainly inapplicable to such a case, because each year's contract was a different contract from the preceding one, in respect there was a yearly increase of wages. Having served the company for one year at one wage, he plainly could not serve the company for another year under the same contract if he received a different wage. If we give effect to the respondents' plea, it comes to this, that the original contract was a valid contract with a break at the end of every year, of which the parties might avail themselves—a proposition to which I cannot assent. I am therefore of opinion that the note of suspension should be passed.

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rance.

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LORD COWAN concurred.

LORD JERVISWOODE also concurred, expressly reserving his opinion as to what the result would be if the question had arisen during the first year of the service. Looking to the peculiar circumstances that the contract was a verbal one for five years, and that there was a yearly change in the rate of wages, he had some doubt whether it would be good even for one year. Injustice might be done by separating the contract into parts, and it was a question, on which he did not pronounce, whether without writing the workman was bound at all.

The conviction was suspended, with expenses.

Feb. 15.
1864.

Present,

THE LORD JUSTICE-CLERK.

LORDS COWAN AND JERVISWOODE.

HER MAJESTY'S ADVOCATE.—*Gifford A.D.*—*A. Moncrieff A.D.*

AGAINST

WILLIAM DUDLEY.—*Fraser—Mair.*

CULPABLE HOMICIDE—CULPABLE VIOLATION AND NEGLECT OF DUTY—INDICTMENT—RELEVANCY—AMENDMENT OF LIBEL.—Objection to the relevancy of an indictment charging an engine-driver with culpable homicide, or culpable violation and neglect of duty, in consequence of which a collision took place and several persons were injured and one killed,—that certain words occurring in the minor proposition, where the cause of the accident was set forth, were not covered either by the major proposition or by previous allegations in the minor, *sustained*.

Amendment of the libel, by striking out the irrelevant words, not being consented to by the panel's counsel, the diet deserted *pro loco et tempore*.

No. 95.
William
Dudley.

WILLIAM DUDLEY, an engine-driver, was indicted and accused—

High Court.
Feb. 15.
1864.

Culpable
Homicide
&c.

THAT ALBEIT, by the laws of this and of every other well-governed realm, culpable homicide; as also culpable violation of duty; as also culpable neglect of duty, by an engine-driver or other person employed upon a railway, whereby any of the lieges are killed or injured, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said William Dudley are guilty of all and each or one or more of said crimes, actor, or art and part: IN SO FAR AS you the said William Dudley having at the time of the collision hereinafter libelled, been employed by John Waddell, a contractor, now or lately residing at or near Bathgate, in the county of Linlithgow, by himself, or others acting for his behoof, in the capacity of engine-driver, to take charge of an engine and trains of railway waggons or trucks upon the Leadburn, Linton, and Dolphinton line or railway, or upon a line or railway, called by some other or similar name to the prosecutor unknown, now or lately in the course of being formed, connected at or near Leadburn railway station, in the county of Edinburgh with the Peebles

railway between Edinburgh and Peebles, now leased to or wrought by the North British Railway Company; and it being the duty of you the said William Dudley, in your capacity of engine-driver foresaid, when the engine under your charge was to be employed in drawing waggons or trucks, not to proceed without the assistance of a brakesman or person to take charge of, and apply the brakes upon the said waggons; and it being further your duty as engine-driver foresaid, when the engine under your charge was employed in drawing waggons, or trucks, on no account to leave the engine without intrusting it to the charge of some competent person, and to take care that the engine should not become uncoupled from or disconnected with the waggons or trucks, without seeing that the trucks were in a position of safety, and that there was no danger of their escaping from the control of you or of the engine under your charge, and to take all necessary means and precautions to prevent danger and injury to the lieges: YET NEVERTHELESS you, the said William Dudley, at a specified time and place, having been in charge of your engine, and there being, at or near the said Leadburn Station, and on the said Leadburn, Linton, and Dolphinton railway, five or thereby trucks or waggons, requiring to be taken along the said Leadburn, Linton, and Dolphinton railway, you, in culpable violation and neglect of your duty as engine-driver foresaid, did attach your engine to the said trucks and proceed therewith along the said Leadburn, Linton, and Dolphinton railway, drawing the said trucks by means of your said engine, without being accompanied by any brakesman, or qualified person to act as brakesman, on the said trucks or waggons, and this although you well knew that John M'Namara, now or lately residing at or near Whim, in the county of Peebles, a duly qualified brakesman had been engaged to act as brakesman under the directions and orders of you the said William Dudley: FURTHER, you having proceeded a certain length with the said engine and trucks along the said Leadburn, Linton, and Dolphinton railway, up an incline on the said railway in the direction of Cowdenburn, you the said William Dudley, in culpable violation and neglect of your duty as engine-driver foresaid, did, at or near the top of said incline on said railway, leave your said engine without entrusting it to the charge of any qualified person, and you did, then and there, detach or uncouple from the said engine the said five or thereby trucks or waggons without taking the necessary precautions to secure that the said trucks should not run down the said incline and escape from the control of you and your said engine; and thereupon, and in consequence of your culpable violation and neglect of duty foresaid, and in consequence of your not taking the necessary means and precautions to prevent danger and injury to the lieges, the said five or thereby railway trucks or waggons being disengaged from the engine in the said incline, and no qualified person being in charge of the engine, the said trucks or waggons, or some of them, ran down the

No. 95.
 William
 Dudley.

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 1864.

Culpable
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1864.

Culpable
Homicide,
&c.

said incline on the Leadburn, Linton, and Dolphinton railway, and did pass from the said railway to and along the line of railway from Edinburgh to Peebles, and did at a part of said last-mentioned railway between the said Leadburn railway station and the railway station at or near Penicuik, both in the county of Edinburgh, ran against and come in collision with, a fast passenger or other train in the employment of the North British Railway Company, then travelling along said Peebles railway; by which collision, and in consequence of your culpable violation and neglect of duty foresaid, and of your failure to use the necessary means to prevent danger and injury to the lieges, one person was killed, and several were severely injured.

FRASER and MAIR, for the panel, objected to the relevancy of the indictment—(1.) In the minor proposition where the duty of the panel was alleged, the words ‘and ‘to take all necessary means and precautions to prevent ‘danger and injury to the lieges,’ were either unnecessary or not sufficiently explicit. (2.) Where the accident and consequent injuries were attributed to failure on the part of the panel to take ‘the necessary means ‘and precautions to prevent danger and injury to the ‘lieges,’ these words were not covered either by the major proposition or by the previous allegations of duty in the minor, and further did not disclose what the prosecutor intended to prove.

GIFFORD and MONCRIEFF, for the prosecution, answered—At common law there was an obligation upon the officials employed by a railway company to take all precautions in their power for the safety of the public, and the failure to do so constituted a relevant matter of criminal charge. A libel similar to that now objected to had been sustained as relevant in the case of *Thomas Rowbotham and others*, High Court, March 19, 1855, Irvine, vol. ii., p. 89.

The opinion of the Court was delivered by

The LORD JUSTICE-CLERK.—In judging of the objections taken to the relevancy of this indictment, it is necessary to observe that the charge in the major proposition of the indictment is, in the first place, culpable homicide, and, secondly, culpable violation of duty. I

take these two together, because, although stated separately in the major, they are dealt with as one charge in the minor proposition. The charge, therefore, in the major is twofold—culpable homicide and culpable violation and neglect of duty. Now the minor proposition proceeds upon a plan that is usual in indictments of this kind, first of all stating what was the duty incumbent on the panel. It states, in the first place, that it was his duty not to proceed with his engine and trucks without the assistance of a brakesman ; in the second place, that it was his duty on no account to leave his engine without entrusting it to the charge of some competent person ; in the third place, that it was his duty to take care that the engine should not become uncoupled from or disconnected with the waggons or trucks, without seeing that the trucks were in a position of safety, and that there was no danger of their escaping from the control of the prisoner, or of the engine under his charge. Then follow these words :—‘ and to take all necessary means and precautions to prevent danger and injury to the lieges.’ I do not know with what view these words were added. Indeed, they seem to me to be so unimportant that I am very much inclined to disregard their presence altogether, and hold them to be mere verbiage. The difficulty, therefore, such as it is, does not lie in that part of the indictment. I take the allegation of duty here to be threefold, as I have already explained. In the next part of the minor proposition, there is a good allegation of a breach of that duty in each of these particulars. It is unnecessary to go over these particulars. Down to that point the Court are of opinion that the indictment is quite relevant. But what follows is just as necessary and important a part of the indictment as that which I have already spoken of. It goes on to state in what way the accident was caused upon the railway, which resulted in the death of one, and the injury of several persons ; and the way in which that is libelled is in these words :— ‘And

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William
Dudley.

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Homicide,
&c.

‘thereupon, and in consequence of your culpable violation and neglect of duty foresaid, and in consequence of your not taking the necessary means and precautions to prevent danger and injury to the lieges,’ the five waggons became disengaged, ran down the incline, and came in collision with a passenger train, ‘by which collision, and in consequence of your culpable violation and neglect of duty foresaid, and of your failure to use the necessary means to prevent danger and injury to the lieges,’ certain persons were killed or injured. Now, in both these places—both where the cause of the accident is alleged, and also where the cause of the death and injuries is alleged—words are introduced for which there is no warrant either in the major proposition or in that portion of the minor which alleges the duty of the prisoner, or in that portion of the minor which alleges a breach of duty. The death, therefore, is ascribed, first, to the ‘culpable violation and neglect of duty foresaid,’ that is to say, to the culpable neglect and violation of duty libelled in the major and minor propositions—an expression which exhausts everything that has been alleged against the panel. But it further ascribes the accident and the death and injuries to another cause, which is not alleged either in the major or minor proposition, and is expressed in these words: ‘in consequence of your not taking the necessary means and precautions to prevent danger and injury to the lieges.’ Now that is a fatal objection to this indictment as it stands, because the accident and the death are ascribed to two causes, one of them being violation and neglect of duty by the panel, and the other something else which is not explained. It is only necessary to add that the importance of this objection is much greater in a case like the present than it would be in any other, because it is within the knowledge of all of us acquainted with the trial of cases of this kind, that the case for the prosecution is most liable to break down, just on the proof of the cause of the ac-

cident ; and if the Court were to permit these words to stand in an indictment of this kind, it might be in the power of the prosecution to bring evidence that the accident was caused by something not charged against the prisoner, and if such evidence was tendered to the Court after they had sustained the relevancy of this indictment, I do not know upon what ground it could be rejected. The Court, therefore, are of opinion that the indictment as it stands is irrelevant ; but it is right to say that if it be consistent with the interest of the prisoner, the indictment could be amended by striking out the objectionable words, so as to prevent the necessity of postponing the trial.

FRASER, for the panel.—Delay in this case would be of advantage to the prisoner, because there are certain witnesses essential for the defence who are not in attendance.

The LORD JUSTICE-CLERK.—We are quite in your hands.

The ADVOCATE-DEPUTE.—Might not these words be struck out without the consent of the panel ?

The LORD JUSTICE-CLERK.—I have never done so without the consent of the prisoner's counsel.

The Court, on the motion of the Advocate-Depute, then deserted the diet against the panel *pro loco et tempore*.¹

No. 98.
William
Dudley.
High Court.
Feb. 15.
1864.
Culpable
Homicide,
&c.

¹ The panel was afterwards indicted for the 14th March on a libel in which the passages objected to were omitted. No further steps have been taken.

Present,

Feb. 29.
1864.

THE LORD JUSTICE-GENERAL.

THE LORD JUSTICE-CLERK.

LORDS COWAN, DEAS, ARDMILLAN, NEAVES, JERVISWOODE.

[*Full Bench.*]

HER MAJESTY'S ADVOCATE—*Sol - Gen. Young—Gifford A.D.*

AGAINST

GEORGE DUNCAN.—*John Lorimer—A. Blair.*

NIGHT POACHING—STATUTE 9TH GEO. IV. c. 69, SECT. 1—JURISDICTION—PREVIOUS CONVICTION.—*Held* (1.) that the 1st section of the Night Poaching Act (9th Geo. IV. c. 69), which directs the punishment of any person who shall by night unlawfully take or destroy game or rabbits, or shall by night unlawfully enter or be in any land for the purpose of taking or destroying game, does not contemplate two separate crimes, but only two different modes of committing a single crime; and (2.) that the Court of Justiciary has no jurisdiction under the above section, except in the case of a third offence. (3.) Observations by the Lord Justice-General as to the proper mode of libelling previous convictions under this Statute.

GEORGE DUNCAN was indicted and accused—

No. 96.
George
Duncan.
High Court.
Feb. 29.
1864.
Night
Poaching.

THAT ALBEIT, by an Act passed in the 9th year of the reign of His late Majesty King George the Fourth, chapter 69, entitled, 'An Act for the more effectual prevention of persons going armed by night for the Destruction of Game,' it is enacted, by the first section thereof, that 'If any person shall, after the passing of this Act, by night unlawfully take or destroy game or rabbits in any land, whether open or enclosed, or shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour; and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or in one surety in ten pounds, for his not offending again for the space of one

‘ year next following ; and in case of not finding such sureties, shall
 ‘ be imprisoned and kept to hard labour for the space of six calendar
 ‘ months, unless such sureties are sooner found ; and in case such per-
 ‘ son shall so offend a second time, and shall be thereof convicted be-
 ‘ fore two justices of the peace, he shall be committed to the common
 ‘ gaol for house of correction for any period not exceeding six calendar
 ‘ months, there to be kept to hard labour, and at the expiration of such
 ‘ period shall find sureties, by recognizance or bond as aforesaid, him-
 ‘ self in twenty pounds, and two sureties in ten pounds each, or one
 ‘ surety in twenty pounds, for his not so offending for the space of two
 ‘ years next following ; and in case of not finding such sureties, shall
 ‘ be further imprisoned and kept to hard labour for the space of one
 ‘ year, unless such sureties are sooner found ; and in case such person
 ‘ shall so offend a third time, he shall be guilty of a misdemeanour,
 ‘ and being convicted thereof, shall be liable at the discretion of the
 ‘ Court, to be transported beyond seas for seven years, or to be impri-
 ‘ soned and kept to hard labour in the common gaol or house of cor-
 ‘ rection for any term not exceeding two years ; and in Scotland, if
 ‘ any person shall so offend a first, second, or third time, he shall be
 ‘ liable to be punished in like manner as is hereby provided in such
 ‘ case.’ YET TRUE IT IS AND OF VERITY, that you the said George
 Duncan are guilty of the statutory crimes and offences above libelled,
 or of one or more of them, actor, or art and part : IN SO FAR AS, you
 the said George Duncan did, by night, that is to say, between the ex-
 piration of the first hour after sunset and the beginning of the last hour
 before sunrise, on the night of the 6th or morning of the 7th day of
 January 1864, or on some other night or morning of the said month
 of January, or of December immediately preceding, unlawfully enter
 or were in a plantation called or known as Philpstoun Moor Plantation,
 situated in the parish of Abercorn, and shire of Linlithgow, then and
 now or lately occupied by the Earl of Hopetoun, armed with a gun or
 other instrument, for the purpose of taking and destroying game : And
 you the said George Duncan have been twice previously convicted of
 the crime and offence specified in the said statute.

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JOHN LORIMER and BLAIR, for the panel, objected, (1.)
 The subsumption did not set forth a relevant charge.
 It had frequently been decided in cases occurring under
 the first section of the Statute, that the Court of Justi-
 ciary had no jurisdiction except in the case of a third
 offence—*Robert Rowet*, Ayr, April 27, 1843, Broun,
 vol. i. p. 540 ; *Matthew Robertson*, Dumfries, April 27,
 1844, Broun, vol. ii. p. 176 ; *David Bell*, Perth, April
 25, 1850, J. Shaw, p. 348. There was also the import

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of the decision in *Caird v. Evans*, High Court, Feb. 7, 1848, Arkley, p. 413. The same view was confirmed by the provisions in the 4th, 8th, 10th, and 11th sections of the Statute. But under the present indictment, assuming it to be found relevant, it would be competent for the jury to return an affirmative verdict, although no previous convictions were proved against the panel. (2.) The libel was irrelevant, in so far as it bore that the panel had been previously convicted 'of the *crime and offence* specified in the said section of the Statute.' In the first place, this was inconsistent with the expression in the subsumption—'statutory *crimes and offences*.' But further, it proceeded upon an erroneous interpretation of the Statute. The section libelled on specified two separate and distinct crimes, viz., 1st, killing game or rabbits by night; and, 2d, entering or being in land by night, for the purpose of killing game—*Jones and M'Ewan v. Mitchell*, High Court, Dec. 23, 1853, Irvine, vol. i. p. 334. There was nothing there to show of which of these two crimes or offences the panel had previously been convicted.

The SOLICITOR-GENERAL and GIFFORD for the prosecution, answered—The style here adopted might not be absolutely the best, but it had long been recognised in practice. Even against the same panel similar indictments had been sustained as relevant—*George Duncan*, High Court, Jan. 6, 1842, Broun, vol. i. p. 4; June 23, 1851 (unreported); and High Court, Dec. 21, 1852, Irvine, vol. i. p. 150. In regard to the objections now stated, (1.) It was a mistake to suppose that the first part of the 1st section set forth two separate crimes or offences. It was evident from the preamble of the Statute, that only a single crime was in the view of the Legislature. This single crime, however, was considered in three different lights, according as it might be committed a first, a second, or a third time. These were the 'statutory crimes and offences,' with one or other of which the panel was charged in the subsumption.

There was nothing irrelevant in this mode of libelling. The Court of Justiciary, as a supreme criminal court in Scotland, was competent to try every offence under the Statute. Its jurisdiction was nowhere expressly excluded. At all events, the question was not free from doubt—*Malcolm M'Gregor and others*, Perth, April 28, 1842, Broun, vol. i. p. 331 ; and the case of *O'Connor* there referred to ; also cases cited in *Alison*, vol. i. p. 554. Even assuming that the Court had no jurisdiction except in regard to a third offence, this was a matter upon which the presiding Judge might safely be left to direct the jury. (2.) The previous convictions were properly and sufficiently libelled. No doubt the indictment did not echo the very words of the Statute, which bore, ' in case such person shall *so offend*,' &c. ; but the two expressions were really equivalent. Any other mode of libelling would expose the public prosecutor to the necessity of proving previous *offences*, not merely previous *convictions*.

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The following opinions were delivered :—

The LORD JUSTICE-GENERAL.—Upon the first point, whether the Court has jurisdiction to try a first or second offence under this Statute, I think that what the Solicitor-General has said is quite correct, and almost conclusive, that while in the case at Perth in 1842, the question was supposed to be open, though even then doubts were entertained regarding it, when it came to be afterwards reconsidered it was held otherwise, and has since been regarded as settled. I confess I think that those cases in which it was decided that the Justice of the Peace or Sheriff is the proper Court for trying a first or second offence, proceeded on a sound construction of the Statute. I think this is clear from the terms of the first section, and still more so, when we take the other clauses along with it. I therefore think that we cannot go back upon this matter.

If this be so, I apprehend there is no use for deciding anything more under this indictment. Certainly it is

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somewhat ambiguously framed. It leaves open the question what is meant by an offence under the Statute. This is a matter upon which, perhaps, it is right that we should give an opinion. The Statute is not very happily expressed ; but, upon the whole, I regard the words at the beginning of the section as describing a single offence, which, however, may be committed in one of two different ways. I think we must so hold in order to get a consistent reading of the Statute. I think that if the party has been twice convicted of committing the statutory offence, in either of the two modes, he is then in the position in which he is liable to be convicted for a third offence.

If these two points are decided, it is easy for the public prosecutor to frame his libel accordingly. It appears to me that in the present case the convictions are libelled too much like aggravations. In no previous part of the indictment are the different elements of charge brought together in such a way as to show that the panel is guilty of a third offence. It is clear that it would not be relevant to libel the previous convictions as simple aggravations introduced in the ordinary way, by the words ' more especially ; ' and that mode of libelling ought not to be adopted in such a case as the present.

I am, therefore, of opinion, in the first place, that we have no jurisdiction in the case of a first or second offence ; and, secondly, that this clause of the Statute sets forth one offence, and that a conviction of any one mode of committing that offence would be relevantly charged as going to constitute the higher offence.

The LORD JUSTICE-CLERK.—I am very clearly of the same opinion. I think that the true construction of the first section of the act is, that it creates a single offence, which no doubt may be committed in two different modes, viz. by unlawfully killing game, or by unlawfully entering on land armed for the purpose of killing game. But these no more constitute separate

offences than the being armed with a gun, is a separate offence from being armed with a net.

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I am also very clearly of opinion, that a second and third offence are not different statutory crimes and offences, but merely repetitions of the same act leading to a more serious punishment.

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In regard to the question of jurisdiction, it is clear that the first and second offences can be tried only by two Justices. But I cannot read the section without seeing that Justices in Scotland, as well as in England, are here meant. By section 10th, jurisdiction is given to the Sheriff cumulatively with the Justices. Now, if the general words at the end of section 1st—which I read as applicable to punishment only—were to be construed as giving jurisdiction to the ordinary criminal courts, I could not understand the necessity of section 10.

If, then, it is clear that this Court has no jurisdiction to try a first or second offence, it seems to me that this indictment is below criticism. The subsumption is, that the prisoner is ‘guilty of the statutory crimes or offences ‘above libelled, or of one or more of them,’—meaning thereby that he is guilty either of a first, a second, and a third all together, or of a first and a second, or of a first and a third, or of a second and a third, or of a first, or of a second, or of a third singly, that is to say, that in every case under section 1st of the Statute, this Court may be called upon to punish this prisoner. This is quite sufficient to cast the indictment.

I shall only say further, that I am not much moved in so clear a case, by an appeal to precedents and styles. No doubt there are cases otherwise doubtful, which might be helped by an appeal to precedents, but when, as here, the logic utterly breaks down, I would not be deterred by any number of mere precedents.

LORD COWAN.—On the question of jurisdiction to which the argument has been mainly directed, I concur with both your Lordships. To me, indeed, it is a mat-

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ter of surprise to hear that the jurisdiction of this Court is thought to apply to a first or second offence. No doubt, in some early cases, it would seem to have been assumed that this Court could entertain such cases, but since Lord Cockburn expressed doubts on the question of jurisdiction in the case of *M'Gregor*, cited to us at the Perth Circuit in 1842, and the clear opinion of the late Lord Justice-Clerk Hope in the case of *Rowet* in April 1843, it has been unanimously understood that this Court has no jurisdiction, except as regards the third offence created by the statutory provision. I make that observation in supplement; because all the subsequent cases—chiefly about the year 1852—proceed on the supposition that this Court has jurisdiction only in the case of a third offence. A different question occurred in the later cases. The late Lord Justice-Clerk had an opinion that there were two separate crimes embraced within the statutory words, whether the offence was a first, a second, or a third offence. And his opinion in the former case of *Duncan*, and also in *Jones v. Mitchell*, certainly seems to proceed on this view. It will be observed, however, that neither the late Lord Handyside nor myself concurred in the judgment in the latter case, but placed our opinions upon the ground adopted by his Lordship. On the contrary, we proceeded upon the ambiguity under the particular indictment caused by the generality of the conviction by the Sheriff, and not on any idea of their being two statutory offences.

This being so, and as I entirely concur as to both the questions now before the Court, I cannot hold this indictment relevant.

I wish only to make one other observation, viz., that I do not understand that our judgment in this case touches in any way the decisions that have been given on indictments under the Coining Acts.

LORD DEAS.—This indictment charges a breach of the 1st section of the Statute 9th Geo. IV. c. 69, which

enacts, *inter alia*, that if any person shall by night 'unlawfully take or destroy any game or rabbits in any 'land,' &c., 'or be in any land with any gun,' &c., 'for 'the purpose of taking or destroying game,' &c., such offender shall be liable to a certain punishment. I think there are not here stated two different offences, but only two modes of committing the same offence. There is no authority to the contrary, except what I must regard as a mere passing observation by the late Lord Justice-Clerk (Hope) on a point incidentally started, in the case of *Jones v. Mitchell*, but which did not enter into the judgment of the Court.

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The other and more important point, which I agree with your Lordships we ought also to decide is, that under the section libelled the Justices of the Peace are alone vested with jurisdiction to try a first and second offence,—the jurisdiction of this Court being applicable only in the case of a third offence. I should be very clearly of that opinion upon the reading of the Statute, and that reading is confirmed both by authority and practice.

These two points being decided, it may not be necessary to decide the relevancy of this indictment if it is to be withdrawn. But if a decision be thought expedient, I am prepared to negative the relevancy. The Solicitor-General does not defend it on principle, but on the ground of practice, which is said to sanction this form of indictment, although a verdict on it could only be given for a third offence. But I think the indictments referred to go to show that there is no established practice—they almost all vary from each other. There may have been practice enough to validate what has been done in prior cases, but that can only be on the footing that, although libelled in this form, it was quite understood that a third offence only was being tried. That is an unsafe practice which ought to be corrected. The natural inference from libelling all the three offences is, that the jury may convict upon any

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one of them. It is said the Court will always take care to tell the jury that they can only convict when a third offence is proved. But what is that, but virtually to leave the Court to make the libel, that is neither safe nor judicial.

LORD ARDMILLAN.—I entertain no doubt on the first point, viz., that the offence set forth in the first part of the 1st section of the Statute is one offence, of which two modes of commission are specified. So to construe the Statute, is to read it, *in mitiore sensu*, since, if two offences were set forth, the offender might the sooner be brought up to the point, when, on the third offence, a severe sentence would follow.

On the other point I shall make only one observation, and I do so chiefly because I have a distinct personal recollection of the case of *Caird v. Evans*. The form of indictment here used was, I imagine, adopted at the time when it was supposed that the Court of Justiciary could try for a first or second offence. So long as that theory was held, it was not unnatural that this inaccurate style of libelling should have prevailed. But when the case of *Caird* came up, although in that case the objection in itself was of no great interest to the accused, the Court suggested that there should be a full argument, and the Crown appointed special counsel for the prisoner, of whom, I myself, was one. It was there strongly pleaded, that the Court of Justiciary had no jurisdiction, except in regard to a third offence. With reference to this point immediately involved in that case, viz. the competency of trying a first offence before the Sheriff with a jury, the Court held, that the jurisdiction of the Sheriff was cumulative with that of the Justices, both as to the crime, and as to the mode of procedure; and, since the procedure before the Justices was summary, a large majority of the Court were of opinion that the procedure before the Sheriff must also be summary. This of course leads to the result of excluding the jurisdiction of the Justiciary Court in regard to a

first or second offence, as this Court does not exercise a summary jurisdiction.

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About three years after this decision, and probably with the case still in his recollection, Mr. Maitland, who was with me in the case of *Caird*, prepared the indictment which has been referred to, and which I regard as the proper and correct style.

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LORD NEAVES.—I concur ; and will only add, that the more correct view seems to be that there are three offences in this section of the Statute, and not one offence, capable of aggravation, according as it is committed a second or third time. The repetition of the offence is not an aggravation, but a substantive element which creates a different offence.

LORD DEAS.—I wish to supply an omission, if I have made it. I also am of opinion that in a certain sense there are three offences under this section, and not mere aggravations as in the ordinary case of previous convictions.

LORD JERVISWOODE.—I concur upon both points.

On the motion of the Solicitor-General the diet was deserted *pro loco et tempore*.¹

¹ The indictment alluded to by his Lordship was that against *George Duncan*, June 23, 1851, unreported. The subsumption there was that the panel was 'guilty of the statutory crime and offence set forth in the section of the said Statute above libelled, by offending as therein set forth a third time.'

Present,

THE LORD JUSTICE-CLERK,

LORDS COWAN AND JERVISWOODE,

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Young—Gifford, A.D.*

AGAINST

ELIZABETH WALKER.—*W. M'Laren.*

MURDER — CULPABLE HOMICIDE—SENTENCE.—A woman charged with the Murder of her new-born child, pleaded guilty of Culpable Homicide—Sentence, fifteen years' penal servitude.

ELIZABETH WALKER was charged with Murder :—

<p>No. 97. Elizabeth Walker. <hr/>High Court. March 7. 1864. <hr/>Murder.</p>	<p>IN SO FAR AS, you the said Elizabeth Walker having, on or about the 21st or 22d day of January 1864, in or near the house or other premises in or near Argyle Square, Edinburgh, then and now or lately occupied by Thomas Croxson Archer, now or lately Director of the Industrial Museum of Scotland, been delivered of a living female child, did, on the 21st or 22d day of January 1864, or on one or other of the days of that month, or of December immediately preceding, in or near the said house or premises in or near Argyle Square, Edinburgh, then and now or lately occupied by the said Thomas Croxson Archer, wickedly and feloniously attack and assault your said child, and did by means of two pieces of flannel or other ligature or ligatures, choke or strangle your said child, and deprive her of life, and your said child was thus murdered by you.</p>
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The panel pleaded Guilty of Culpable Homicide, and this plea was accepted by the prosecutor.

Sentence was deferred till the 14th March, when—

The LORD JUSTICE-CLERK said—You have confessed to killing your new-born child in the place and manner specified in the indictment. You have not indeed pleaded guilty to the charge of murder, and the prosecutor has accepted the mitigated plea; but from the manner in which your child has been killed, and no extenuating circumstances having been stated or proved, the Court have no alternative but to inflict a sentence of fifteen years' penal servitude.

Present,

THE LORD JUSTICE-CLERK,

LORDS ARDMILLAN AND JERVISWOODE,

HER MAJESTY'S ADVOCATE—*Gifford, A.D.—A. Moncrieff, A.D.*

AGAINST

JOANNIS MANOLATOS *alias* JEAN MARRATO *alias* MAYATOS
—*D. Mackenzie—Mair.*

MURDER—ASSAULT—INSANITY—PLEA IN BAR OF TRIAL—EVIDENCE.

—Circumstances in which a charge of Murder, a plea of insanity in bar of trial was sustained on evidence led.

JOANNIS MANOLATOS *alias* JEAN MARRATO *alias* JEAN MAYATOS, was indicted and accused :—

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THAT ALBEIT, by an Act passed in the eighteenth and nineteenth years of the reign of her Majesty Queen Victoria, chapter ninety-one, intituled, 'An Act to facilitate the Erection and Maintenance of Colonial Lighthouses, and otherwise to Amend the Merchant Shipping Act, 1854,' it is enacted by section twenty-first thereof, that 'if any person, being a British subject, charged with having committed any crime or offence on board any *British* ship on the High Seas or in any foreign port or harbour, or if any person not being a *British* subject, charged with having committed any crime or offence on board any *British* ship on the High Seas, is found within the jurisdiction of any Court of Justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits:' AND ALBEIT, by the laws of this and of every other well-governed realm, Murder; As also Assault, especially when committed by Cutting or Stabbing, to the effusion of blood, the injury of the person, and the danger of life, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Joannis Manolatos *alias* Jean Marrato *alias* Jean Mayatos are guilty of the said crime of murder, and of the said crime of assault, aggravated as aforesaid, or of one or other of said crimes, or art and part: IN SO FAR AS (1.), you having sailed from Callao, in South America, on or about the 9th day of October 1863, as a seaman on board the British ship or vessel called the 'Pontiac of

No. 98. 'Liverpool,' then belonging to William Humphery Owen, now or
 Joannis lately ship-owner, residing at or near Plasynpenryn, in the county of
 Manolatos Anglesea, Wales, said ship or vessel being bound for Great Britain,
 High Court. you the said Joannis Manolatos *alias* Jean Marrato *alias* Jean Mayatos,
 April 6. on the 13th day of October 1863, or on one or other of the days of
 1864. that month, or of November immediately following, on board the said
 Murder, &c. British ship or vessel 'Pontiac of Liverpool,' and while the said ship
 or vessel was on the high seas, in or near latitude 21° 25' south, and
 longitude 84° west, and about 700 miles or thereby from Callao afore-
 said, did, wickedly and feloniously, attack and assault the now
 deceased Robert Campbell, then a seaman on board of said ship or
 vessel 'Pontiac of Liverpool,' and did with a knife, or with some other
 sharp or cutting instrument to the prosecutor unknown, stab or cut
 him one or more times on or near the breast or belly, or other parts of
 his person, whereby he was mortally wounded, and immediately or
 soon thereafter died, and was thus murdered by you the said Joannis
 Manolatos *alias* Jean Marrato *alias* Jean Mayatos: LIKEAS (2.), time
 and place above libelled, you the said Joannis Manolatos *alias* Jean
 Marrato *alias* Jean Mayatos did, wickedly and feloniously, attack and
 assault George Williams, then a seaman on board said ship or vessel
 'Pontiac of Liverpool,' and did with a knife, or with some other sharp
 or cutting instrument to the prosecutor unknown, stab or cut him on
 or near the private parts or other part of his person, to the effusion of
 his blood, the injury of his person, and the danger of his life; and you
 the said Joannis Manolatos *alias* Jean Marrato *alias* Jean Mayatos
 were found within the jurisdiction of the High Court of Justiciary in
 Scotland, which Court, in virtue of the above recited Act, has juris-
 diction to try you for the crimes above libelled against you.

A minute was given in for the panel, stating that he was not a proper object for trial, being at present insane and unable to instruct counsel for his defence.

The Court allowed a proof of the alleged insanity in bar of trial.

DOUGLAS MACLAGAN, M.D.—I visited the prisoner with Dr. Skae on 9th March, and again on the 10th. I know the nature of the charge, and of his declaration. I came to the conclusion that he is possessed of an insane delusion, viz. that the two men, one of whom he killed, and the other of whom he assaulted, had been bribed by the master of the vessel in which he had previously sailed, to throw him over board—this delusion renders him incapable of instructing counsel and agents for his defence—he is insane.

Cross-examined.—I think his delusion permanent. I believe him

to be in the same state now—he showed no insanity on any other subject. In other matters he may know the difference between right and wrong, but in this matter he believes wrong to be right, for he thinks he was justified in killing the two men to save his own life, therefore he does not know the nature and quality of the act with which he stands charged.

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To the Court.—My opinion rests on the assumption that it is not the fact that the master bribed the two men to throw him overboard. If that were true, then there would be no insane delusion.

DAVID SKAE, *Resident Physician of Morningside Asylum.*—I went with the last witness to visit prisoner. I saw him also the day before yesterday. He labours under insane delusion, that there was a conspiracy against his life—that the captain of the vessel in which he sailed from Liverpool, had bribed two men to throw him overboard. I have no doubt he is still under that delusion, therefore unable to instruct counsel and agent.

Cross-examined.—He has no appearance of insanity in any other matters. He speaks English wonderfully, and can well answer questions in English. I heard him tell his own story in English, and then I examined him through an interpreter, Dr. Clyde, of the Edinburgh Academy.

To the Court.—Suppose the facts to be true that Stocks had bribed the two men to throw him overboard, and the prisoner knew it, I should give up the opinion that there is any insane delusion. He spoke with great earnestness on this subject—there was no appearance however of insanity in manner or talk, except that he maintains strongly the existence of the conspiracy against him. I was quite satisfied there was no feigning of insanity, for I gave him opportunities of exhibiting insanity which he did not avail himself of.

JAMES CLYDE.—I know modern Greek. I was present at the prisoner's declaration, and went with Dr. Maclagan and Dr. Skae twice to visit prisoner, I faithfully interpreted on all these occasions.

JOHN CRIFFITHS.—I sailed with prisoner from Liverpool to Valparaiso in the 'Atakualpa'—we sailed in April '63—she was wrecked on the 11th July 1863 near Valparaiso. Prisoner and I shipped on board the 'Pontiac,' Capt. Jones, to Callao and England. At Callao we shipped Robert Campbell and George Williams. The prisoner had no quarrel with Capt. Stocks that I know of. Prisoner was quiet and well behaved, and had no quarrel that I know of in either vessel. He did not associate much with the other men—he was the only Greek on board—there were Danes, Swedes, and English in the 'Pontiac.' Stocks did not sail in the 'Pontiac,' but was on board of her while she was in Valparaiso. Campbell and Williams had not been on board of the 'Atakualpa.' We sailed from Valparaiso on 16th October 1863. I saw Campbell after he was stabbed. After this prisoner went to the top of the poop, he was very wild-looking. I saw him put in

No. 98. *Joannis* irons. Sometime after we left Callao, prisoner told me he was sorry for what he had done, but it could not be helped now. I asked why he had done it? he said, if he had not done it that afternoon, they would have had him overboard that night. I said, no, that would do—nobody thought of it. He made no answer, but shook his head.

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Murder, &c. Campbell and Williams were quiet men so far as I could see. I never heard them say any thing about pitching him overboard. I know no reason prisoner had for attacking them. It was about 3.30 P. M. that I saw Campbell wounded. The prisoner never said to me at any other time that the men were going to throw him overboard. Prisoner had a very wild temper—very irritable. When any thing went wrong, taking in sails, or any thing like that, he would mutter and curse to himself, but did not quarrel with us. I never heard him speak of Capt. Stocks of the 'Atakaulpa' after we were in the 'Pontiac.'

WILLIAM LEWIS, *first Mate of the 'Pontiac.'*—I joined at Valparaiso—the prisoner shipped there. I had known him in the 'Atakaulpa.' I was second mate in her—the prisoner was not at all times a quiet and well-behaved man—he was of a very fiery disposition, but he never quarreled with any of the men, except with first mate of the 'Atakaulpa,' on the passage out—his name was T. R. Rose. I did not know what the dispute was about. Prisoner was a very poor seaman—he kept to himself very much—he did not speak English readily. On the Sunday before Campbell's death, I saw prisoner crying bitterly on the fore part of the ship on deck. On Monday morning, between 3 and 4 o'clock, I asked him what had been the matter with him on Sunday—he said, nothing—that was all that passed. I never saw Campbell or Williams, or any of the seamen, teasing him. We had only been five days at sea from Callao when Campbell was killed. About 3.30 P. M. on the day of the murder, I saw prisoner coming out of the forecabin in a very excited state, with his knife in his hand, blade downwards—he ran up to the top of the poop, still holding his knife—he said, I gave it them at last. Campbell and Williams then came out of the forecabin, both wounded. We mustered the crew, and got prisoner down from the poop. I called him to come down, and he did so without any resistance. He said, for God's sake don't kill me. I said no one would kill him, but we would put him in irons—we did so—he submitted quietly. The wild appearance had left him a while after the irons were put on—in a few hours. The ship put back to Callao. I asked him afterwards if he was sorry for what he did—he said, no, what's the use of that now. I asked him why he had stabbed them—he said, if he not killed them, they would have killed him—and, pointing up with his hand, he said, He, God Almighty, told me that they were going to kill me unless I killed them—he said this quite quietly and coolly, as if he believed it. I said, that was a poor reason to kill men. I asked him if he was out of his mind—he said,

no, there is nothing wrong with me. There had been no quarrel on board the 'Pontiac' that I know of. I never heard prisoner speak to Campbell or Williams. Campbell died the morning after he was stabbed. We left Williams in the hospital at Callao. Campbell said he did not know why prisoner should have stabbed him more than any other man. There had been no larking or teasing prisoner that I know of. We left Capt. Stocks at Valparaiso. Callao was 800 to 1000 miles from Valparaiso.

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1864.
Murder, &c.

JOHN MORRIS.—I was seaman on board the 'Pontiac.' I saw prisoner crying on the Sunday before Campbell was killed—he cried for about a quarter of an hour. On the 13th, I was in the forecastle about 3.30 P. M. There were three other men there besides prisoner, Campbell, and Williams—they were all in bed except me. Prisoner came into the forecastle, and asked for a match to light his pipe—he sat down and smoked for five minutes without speaking—nothing was said to anybody. I turned round and saw prisoner driving a knife into Campbell, who was fast asleep—then he ran to Williams, who was lying on his back reading a book, and he drove the knife into Williams, then I ran out and prisoner ran after me, with his knife open. Prisoner was like a wild man. The mate said to him, what is this for? and the prisoner answered, the man up-stairs told me they would kill me to-night—the mate thought he meant the man sitting aloft, and asked if it was he; but he said—'not him—God.' On the homeward voyage I used to take his meat to the prisoner—he never spoke, but looked very hard at me.

The following interlocutor was pronounced :—

'The Court having heard the evidence adduced, find
' it sufficiently instructed that the panel is in a state of
' insanity, and cannot be tried under the present indictment,
' therefore deserted the diet *pro loco tempore* :
' Farther, in terms of the provision in the 87th section
' of the Act 20th and 21st Victoria, cap. 71, the Court
' ordered the panel to be kept in strict custody in the
' Prison of Edinburgh till her Majesty's pleasure be
' known.'

SOUTH CIRCUIT.

April 8.
1864.

AYR.

Judge—LORD ARDMILLAN.

HER MAJESTY'S ADVOCATE—*Thoms, A.D.*

AGAINST

THOMAS SIMPSON—*Cattanach.*

CULPABLE NEGLECT OF DUTY—INDICTMENT—RELEVANCY.—A charge of Culpable Neglect of Duty, 'whereby any of the lieges are put to danger of their lives and persons,'—held irrelevant.

No. 99.
Thomas
Simpson.

THOMAS SIMPSON was indicted and accused :—

Ayr.
April 8.
1864.
Culpable
Neglect of
Duty, &c.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Culpable Homicide; As also Culpable Neglect of Duty by a foreman of brushers, or any other person employed in or in connection with a coal-pit, whereby any of the lieges are put in danger of their lives or persons, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Thomas Simpson are guilty of the said crimes, or of one or other of them, actor, or art and part: IN SO FAR AS, you the said Thomas Simpson having, time hereinafter libelled, acted as foreman of the brushers in the coal-pit known as the Corsehill Pit, situated in the parish of Kilwinning, and shire of Ayr, then and now or lately occupied by the company carrying on business under the style and title of the Eglinton Iron Company, and it being your duty to see and take care that the roof of the main drawing-road in connection with the seam of coal in the said pit, called the Ladyhall Seam, was put and kept in good, sufficient, and safe order, and that suitable and sufficient props were put in to support the said roof wherever necessary, and a portion of the roof of the said main drawing-road being, as you knew, or might and ought to have known, insufficient and dangerous to the lives and persons of the miners or workmen employed in said pit, from the stone or other substance forming or composing the same being loosened or cracked, or otherwise unsound and insecure, and a fall from the said portion of roof having, as you well knew, taken place on or about the 31st day of October 1863, and it being your duty to take steps to have rendered the said insufficient and dangerous portion of the roof of the said road safe and secure, either by seeing that it was sufficiently supported

by suitable props, or by removing any loose stones therein, and to have prevented the miners or workmen passing under or near the said insufficient and dangerous portion of the roof until the same was properly secured, or the loose stones therein removed ; and it being your duty, if you could not yourself while on duty and before leaving the pit take measures to render the said insufficient and dangerous portion of roof safe and secure, to communicate, at the expiration of your shift, the insufficient and dangerous condition of the same to Andrew Allison, then and now or lately day-roadsman in the said pit, or to William Beveridge, then and now or lately the underground oversman in the said pit, in order that one or other of them might adopt measures to render the said insufficient and dangerous portion of roof safe and secure : YET NEVERTHELESS, you the said Thomas Simpson did, on the 1st or 2d day of November 1863, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, in the knowledge of the insufficient and dangerous state of the said portion of the roof of the said main drawing-road, and in culpable violation of your duty above libelled, fail and omit to see and take care that the said portion of roof was put and kept in good, sufficient, and safe order, by the removal of any unsound and insecure stones or other substances therein, or by having suitable and sufficient props put in to support the said portion of roof, and you did permit and allow the said portion of roof to remain in a insufficient and dangerous state, and did fail and omit to remove one or more large, loose, or unsound and insecure stones, in the said portion of roof, and to put suitable and sufficient props underneath one or more large, loose, or unsound and insecure stones, in the said portion of roof, and you did fail and omit to prevent the miners or workmen in the said pit from passing along the said drawing-road, under and near the said large, loose, or unsound and insecure stones or stone in the said portion of roof, and you did further fail and omit, at the expiration of your shift, on the morning of the said 2d day of November 1863, to communicate the insufficient and dangerous condition of the said portion of roof, in consequence of the said large, loose, or unsound and insecure stone or stones therein, to the said Andrew Allison or the said William Beveridge, although you had not before leaving the pit taken any measures to render the said insufficient and dangerous portion of roof safe and secure, and the following persons, miners or workmen in the said pit, or one or more of them, were in consequence allowed, on the said 2d day of November 1863, to enter upon and pursue their duties in the said pit, and to pass along the said drawing-road under or near the said large loose or unsound and insecure stone or stones in the said portion of roof—to wit, the now deceased Thomas Bingham, then or lately before residing at or near Five Roads, in the parish of Kilwinning aforesaid ; John Wales and Abraham Wales, both then and now or lately residing in or near Kenneth's Row of Kilwinning ; John Todd and Joseph Smith,

No. 99.
Thomas
Simpson.

Ayr.
April 8.
1864.

Culpable
Neglect of
Duty, &c.

No. 99.
Thomas
Simpson.

Ayr.
April 6.
1864.

Culpable
Neglect of
Duty, &c.

both then and now or lately residing in or near the Green of Kilwinning; John Richmond senior, John Richmond junior, William Forsyth, Hugh Richmond, Campbell Haddow, and Henry Strachan, all then and now or lately residing at or near Corsehill, in the parish of Kilwinning; and James Nicol, then and now or lately residing in or near Halfway of Irvine, in the parish of Dundonald, and shire of Ayr; and the said loose or unsound and insecure stone or stones did, on the said 2d day of November 1863, give way and fall upon the said Thomas Bingham, who was thereby crushed, or was otherwise mortally injured, and immediately or soon thereafter died—by all which, or part thereof, the said Thomas Bingham was culpably killed by you the said Thomas Simpson; and the said John Wales, Abraham Wales, John Todd, Joseph Smith, John Richmond senior, John Richmond junior, William Forsyth, Hugh Richmond, Campbell Haddow, Henry Strachan, and James Nicol, or one or more of them, were put in danger of their lives or persons by you the said Thomas Simpson.

CATTANACH, for the panel, objected to the relevancy of the second charge in the major, on the ground that culpable neglect of duty, without any result except mere danger to life, was not an indictable offence, *Robert Young*, High Court, May 21. 1839, Swinton, vol. ii. p. 376.

THOMS, for the prosecution, answered—Charges similar to the present have often gone to trial, *John Elder Murdoch*, Perth, May 2. 1849, J. Shaw, p. 229; *Thomas Henderson and others*, High Court, Aug. 29. 1850, J. Shaw, p. 394; *John Latto*, High Court, Nov. 9. 1857, Irvine, vol. ii. p. 732; *Alexander Robertson*, High Court, Feb. 8. 1859, Irvine, vol. iii. p. 328. The decision in the case of *Young* did not go the length contended for. At all events, the results of the panel's neglect of duty were sufficiently set forth in the minor proposition.

The Court sustained the objection. The panel pleaded not guilty of culpable homicide. After evidence led, the jury returned a verdict of 'not proven,' and the panel was dismissed from the bar.

WEST CIRCUIT.

GLASGOW.

April 21.
1864.*Judge*—LORD DEAS.HER MAJESTY'S ADVOCATE—*Crichton, A.D.*

AGAINST

EDWARD RICE—*J. C. Thomson.*

RAPE—ASSAULT WITH INTENT TO RAVISH—EVIDENCE—DEAF AND DUMB WITNESS.—In a trial for rape, a deaf and dumb witness who was uneducated, and there was reason to believe had no knowledge of a Supreme Being, examined on declaration.

EDWARD RICE was charged, alternatively, with rape, or assault with intent to ravish, committed on the person of Ann Nelson. The panel pleaded not guilty. Before calling the principal witness (Ann Nelson), the Advocate-depute stated that she had been deaf and dumb since she was four years of age, that she was uneducated, and could only make herself intelligible by natural signs and gestures; and that in these circumstances he proposed to examine her through the medium of an interpreter.

No. 100.
Edward
Rice.
Glasgow.
April 21.
1864.
Rape, &c.

THOMSON, for the panel, objected to the witness being examined, unless it could be shown that she understood the nature of an oath.

The ADVOCATE-DEPUTE explained that he did not ask the witness to be sworn, but merely that a declaration should be taken from her, as from a child under puberty. —*John Skillin Montgomery*, Aberdeen, Sept. 25. 1855, Irvine, vol. ii. p. 222.

LORD DEAS ruled that, before disposing of the objection, evidence should be led as to the mental capacity of the witness.

No. 100.
Edward
Rice.

Glasgow.
April 21.
1864.

Rape, &c.

The following witnesses were then examined :—

JAMES LAWRIE.—I am Assistant Superintendent in the Deaf and Dumb Institution, Glasgow. I saw the witness, Ann Nelson, to-day for about ten minutes. I also saw her a month ago for about an hour. She has had no education. Does not understand the manual alphabet for the deaf and dumb. Communicates merely by natural signs and gestures. Does it so as to make herself perfectly intelligible. So far as I can judge, she has no notion of a Supreme Being, to whom she is responsible for her acts. I think she understands the distinction between right and wrong.

Cross-examined for the panel.—In saying that I think she knows right from wrong, I judge from my general experience of the deaf and dumb. I know nothing special about this girl. I have no doubt that she knows an unchaste action to be wrong. The abhorrence which she expressed for what the prisoner had done to her confirmed me in the opinion which I had formerly formed upon that point.

To the Court.—Apart from her being deaf and dumb, the girl is not deficient in intelligence. My experience is, that those who have lost their hearing after having learned to speak, are more intelligent than those who are born deaf and dumb.

ANN ASKEN' or CARMICHAEL, the mother of the witness.—My daughter is twenty-four years of age. She lost her hearing when she was about four years old. She communicates by natural signs. I can generally understand what she means, but not always. I cannot say whether she has any knowledge of a God. I have no doubt she understands the difference between right and wrong. I cannot say whether she knows that it is wrong to tell a lie.

To the Court.—She was four years and four months old when she lost her hearing. She spoke before that. She began to speak when she was about sixteen months old. She was an intelligent child. She spoke and heard as well as children generally. When I understand what she communicates to me, I have every reason to believe it is the truth. She has always behaved with perfect propriety.

The examination of the witness was then allowed to proceed, by way of declaration, through the medium of Mr. Lawrie, who was sworn as interpreter.

The jury, after a long trial, found the prisoner guilty of assault with intent to ravish. Sentence, twelve months' imprisonment.

Judge—LORD DEAS.

HER MAJESTY'S ADVOCATE—*Crichton, A.D.*

AGAINST

MATTHEW WEIR AND JACOB HULL—*M'Kie—R. V. Campbell.*

BASE COIN—STATUTE 24TH AND 25TH VICT. C. 99.—In an indictment under 24th and 25th Vict. c. 99, sect. 10, charging two acts of uttering base coin, the second act was alleged to have been committed, 'time and place above libelled,' and being on the day 'of 'the first uttering,' or within the space of ten days then next ensuing.—Objection, (1.), That the two acts of uttering constituted one offence, and ought to have been so charged; and, (2.), That the indictment ought to have been simply in terms of the Statute—on 'the day of such uttering.'

It is incompetent under the above Statute to charge a panel with having in his possession the same base coins which in a previous article of the libel he is charged with uttering.

MATTHEW WEIR and JACOB HULL were indicted and accused:—

THAT ALBEIT, by an Act passed in the twenty-fourth and twenty-fifth years of the reign of Her Majesty Queen Victoria, chapter ninety-nine, entituled, 'An Act to Consolidate and Amend the Statute Law of the United Kingdom against Offences relating to the Coin,' it is enacted by section ninth of the said Act, that 'Whosoever shall tender, utter, or put off, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanour, and in Scotland of a crime and offence; and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement: ' And it is enacted by section tenth of the said Act, that 'Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin, resembling, or apparently in-

No. 101.
Matthew
Weir and
Jacob Hull
Glasgow.
April 21.
1864.

Base Coin.

No. 101.
Matthew
Weir and
Jacob Hull.
Glasgow.
April 21.
1864.
Base Coin.

‘ tended to resemble or pass for, any of the Queen’s current gold or
‘ silver coin, or shall, either on the day of such tendering, uttering, or
‘ putting off, or within the space of ten days then next ensuing, tender,
‘ utter, or put off, any false or counterfeit coin, resembling, or appar-
‘ ently intended to resemble or pass for, any of the Queen’s current
‘ gold or silver coin, knowing the same to be false or counterfeit, shall
‘ in England and Ireland be guilty of a misdemeanour, and in Scotland
‘ of a crime and offence; and being convicted thereof, shall be liable,
‘ at the discretion of the Court, to be imprisoned for any term not ex-
‘ ceeding two years, with or without hard labour, and with or without
‘ solitary confinement.’ And it is enacted by section eleventh of the
‘ said Act, that ‘ Whosoever shall have in his custody or possession
‘ three or more pieces of false or counterfeit coin, resembling, or
‘ apparently intended to resemble or pass for, any of the Queen’s cur-
‘ rent gold or silver coin, knowing the same to be false or counterfeit,
‘ and with intent to utter or put off the same, or any of them, shall in
‘ England and Ireland be guilty of a misdemeanour, and in Scotland
‘ of a crime and offence; and being convicted thereof, shall be liable,
‘ at the discretion of the Court, to be kept in penal servitude for the
‘ term of three years, or to be imprisoned for any term not exceeding
‘ two years, with or without hard labour, and with or without solitary
‘ confinement.’ And it is enacted by section twenty-fourth of the said
‘ Act, that ‘ Whosoever, without lawful authority or excuse (the proof
‘ whereof shall lie on the party accused), shall knowingly make or
‘ mend, or begin or proceed to make or mend, or buy or sell, or have
‘ in his custody or possession, any puncheon, counter-puncheon, matrix,
‘ stamp, die, pattern, or mould, in or upon which there shall be made
‘ or impressed, or which will make or impress, or which shall be adapt-
‘ ed and intended to make or impress, the figure, stamp, or apparent
‘ resemblance of both or either of the sides of any of the Queen’s cur-
‘ rent gold or silver coin, or of any coin of any foreign prince, state, or
‘ country, or any part or parts, or both or either of such sides; or
‘ shall make or mend, or begin or proceed to make or mend, or shall
‘ buy or sell, or have in his custody or possession, any edger, edging,
‘ or other tool, collar, instrument, or engine, adapted and intended, for
‘ the marking of coin round the edges with letters, grainings, or other
‘ marks or figures, apparently resembling those on the edges of any
‘ such coin as in this section aforesaid, knowing the same to be so
‘ adapted and intended as aforesaid; or shall make or mend, or begin
‘ or proceed to make or mend, or shall buy or sell, or have in his custody
‘ or possession, any press for coinage, or any cutting engine for cut-
‘ ting by force of a screw, or of any other contrivance, round blanks
‘ out of gold, silver, or other metal, or mixture of metals, or any other
‘ machine, knowing such press to be a press for coinage, or knowing
‘ such engine or machine to have been used, or to be intended to be

‘ used, for or in order to the false making or counterfeiting of any such
 ‘ coin as in this section aforesaid, shall in England and Ireland be
 ‘ guilty of felony, and in Scotland of a high crime and offence; and
 ‘ being convicted thereof, shall be liable, at the discretion of the Court,
 ‘ to be kept in penal servitude for life, or for any term not less than
 ‘ three years, or to be imprisoned for any term not exceeding two
 ‘ years, with or without hard labour, and with or without solitary con-
 ‘ finement:’ YET TRUE IT IS AND OF VERITY, that you the said Mat-
 thew Weir are guilty of the statutory crimes and offences set forth in
 the above recited ninth, tenth, eleventh, and twenty-fourth sections of
 the said statute, or one or more of them, actor, or art and part; and
 you the said Jacob Hull are guilty of the statutory crimes and offences
 set forth in the above recited ninth, tenth, and eleventh sections of the
 said statute, or one or more of them, actor, or art and part: IN SO FAR
 AS (1.), on the 21st day of February 1864, or on one or other of the
 days of that month, or of January immediately preceding, or of March
 immediately following, in or near the shop or premises in or near Broad
 Close, in or near Main Street, Crawforddyke, in or near Greenock,
 then and now or lately occupied by Mary Macfarlane or Munro, widow,
 then and now or lately residing in or near Main Street aforesaid, you
 the said Matthew Weir and Jacob Hull did, both and each or one or
 other of you, wickedly and feloniously, tender, utter, or put off, Three
 or thereby False or Counterfeit Coins, each resembling, or apparently
 intended to resemble or pass for, a Florin or Two-Shilling Piece of the
 Queen’s current Silver Coin, you knowing the same to be false or counter-
 feit, by then and there tendering or delivering the same, as genuine,
 to the said Mary Macfarlane or Munro in payment of the price of three
 pig’s feet then and there purchased by you the said Matthew Weir
 and Jacob Hull, or one or other of you, you the said Matthew Weir
 and Jacob Hull, or one or other of you, receiving the balance in change:
 LIKEAS (2.), Time and Place above libelled, and being on the day of
 the tendering, uttering, or putting off of the false or counterfeit coins
 above libelled, or within the space of ten days then next ensuing, you
 the said Matthew Weir and Jacob Hull did, both and each or one or
 other of you, wickedly and feloniously, tender, utter, or put off, Five
 False or Counterfeit Coins, each resembling, or apparently intended to
 resemble or pass for, a Sixpence Piece of the Queen’s current Silver
 Coin, and Five False or Counterfeit Coins, each resembling, or appar-
 ently intended to resemble or pass for, a Threepence Piece of the Queen’s
 current Silver Coin, you knowing the same to be false and counterfeit,
 by then and there tendering or delivering the same, as genuine, to the
 said Mary Macfarlane or Munro in payment of the price of two pig’s
 feet, two biscuits, and a quantity of potted-head and pudding, then and
 there purchased by you the said Matthew Weir and Jacob Hull, or
 one or other of you, you the said Matthew Weir and Jacob Hull, or

No. 101.
 Matthew
 Weir and
 Jacob Hull.
 Glasgow.
 April 21.
 1864.
 Base Coin.

No. 101. one or other of you, receiving the balance in change: **LIKEAS** (3.),
 Matthew Time and Place above libelled, you the said Matthew Weir and Jacob
 Weir and Hull, both and each or one or other of you, had in your custody or
 Jacob Hull. possession, Three or thereby False or Counterfeit Coins, each resembling,
 April 21. or apparently intended to resemble or pass for, a Florin or Two-Shilling
 1864. Piece of the Queen's current Silver Coin, Five or thereby False or
 Base Coin. Counterfeit Coins, each resembling, or apparently intended to resemble
 or pass for, a Sixpence Piece of the Queen's current Silver Coin, and
 Five or thereby False or Counterfeit Coins, each resembling, or appar-
 ently intended to resemble or pass for, a Threepence Piece of the
 Queen's current Silver Coin, knowing the same to be false or counterfeit,
 and with intent to utter or put off the same, or one or more of them:
FURTHER (4.), on the 24th day of February 1864, or on one or other
 of the days of that month, or of January immediately preceding, or of
 March immediately following, in or near the house or premises in or
 near Kelvinhaugh Street, in or near Glasgow, then occupied by you
 the said Matthew Weir, then or lately before residing there, you the
 said Matthew Weir had knowingly, and without lawful authority or
 excuse, in your custody or possession, a pattern or mould in two pieces,
 in or upon which there was made or impressed, or which would make
 or impress, or which was adapted and intended to make or impress,
 the figure, stamp, or apparent resemblance of both or one or other of
 the sides of a florin or two-shilling piece of the Queen's current silver
 coin, or some part or parts thereof.

M'KIE AND R. V. CAMPBELL, for the panels, objected to the relevancy of the second and third charges.

To the second charge it was objected, (1.), That the two acts of uttering having plainly taken place on the same occasion, truly constituted only a single offence, and ought to have been so charged; and, (2.), That instead of libelling the second uttering as having taken place at the time of the first, the indictment ought to have borne in terms of the Statute, 'on the day of such ten-
 'dering, uttering, or putting off.' *John Mooney*, High Court, Dec. 8. 1851, J. Shaw, p. 509; *Peter Kerr*, High Court, Feb. 22. 1841, Swinton, vol. ii. p. 533; and *Bell's Notes to Hume*, p. 131.

To the third charge it was objected, that the coins there libelled being the same as those libelled in the two previous articles, the charge ought to have been stated alternatively and not cumulatively, *Peter Reilly*,

Feb. 21. 1842, Bell's Notes, p. 131 and 135; *James Graham, ibid*, p. 135.

CRICHTON, for the prosecution, admitted that the coins which the panels were charged with having in their possession, were the same as those which they were charged with uttering.

The Court sustained the objection to the third charge, and ordered that charge to be struck out of the indictment, but otherwise found the libel relevant.

The panels pleaded Not Guilty, and a proof was led.

The jury found the panels guilty as libelled.

Sentences—Weir twelve months' and Hull eight months' imprisonment.

No. 101.
Matthew
Weir and
Jacob Hull.
Glasgow.
April 21.
1864.
Base Coin.

Judges—LORDS DEAS AND NEAVES,

HER MAJESTY'S ADVOCATE—*Crichton, A D.*

AGAINST

THOMAS SINCLAIR AND JAMES M'LYMONT—*Cattinach.*

HOUSEBREAKING WITH INTENT TO STEAL—INDICTMENT—RELEVANCY.

—An indictment charged the wickedly and feloniously breaking a pane of glass in the window of a shop or other premises for the purpose of entering and stealing therefrom. The minor set forth that the panels after breaking a pane of the window of a pawn-office, 'did endeavour to force or push up the shutter on the outside of said window.'—Objection sustained that the *species facti* set forth in the minor amounted only to attempt at housebreaking,

THOMAS SINCLAIR and JAMES M'LYMONT were indicted and accused :—

THAT ALBEIT, by the laws of this and of every other well-governed realm, Theft, especially when committed by means of Housebreaking, and by a person who has been previously convicted of theft; As also the wickedly and feloniously Breaking a Pane of Glass in the window of a shop or other premises for the purpose of Entering and Stealing therefrom, are crimes of an heinous nature, and severely punishable.

No. 102.
Thomas
Sinclair
and James
M'Lymont.
Glasgow.
April 21.
1864.
House-
breaking
with Intent
to Steal.

No. 102.
Thomas
Sinclair
and James
M'Lymont.

The part of the minor proposition applicable to the second charge was as follows :—

Glasgow.
April 21.
1864.

House-
breaking
with intent
to steal.

LIKEAS (2.), on the 7th or 8th day of November 1863, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, you the said Thomas Sinclair and James M'Lymont did, both and each or one or other of you, wickedly and feloniously, break a pane of glass in a window of the pawn-office or premises in or near High Street, in or near Dumbarton, then and now or lately occupied by the company then and now or lately carrying on business there as pawnbrokers, under the firm of Hamilton and Hill, or under some similar firm, and did endeavour to force or push up the shutter on the inside of said window, and this you the said Thomas Sinclair and James M'Lymont, both and each or one or other of you, did, for the purpose of entering the said pawn-office or premises, and stealing therefrom.

CATTANACH, for the panels, objected to the relevancy of the second charge, in respect that the *species facti* set forth in the minor amounted only to attempt at house-breaking, with intent to steal, which was not an indictable offence.

CRICHTON, for the prosecution, replied.—A similar charge had been sustained as relevant in the case of *James Monteith*, High Court, Jan. 22. 1840, Swinton, vol. ii. p. 483.

After consultation—

LORD NEAVES said, that in order to constitute the crime of housebreaking with intent to steal, it was necessary not only that there should be the criminal intent, but also that, in execution of that intent, the security of the house or other premises should be effectually invaded and overcome. In the present indictment, while it was alleged that the panels had succeeded in breaking a pane of glass in the window of the pawn-office, it was clear that their efforts to effect an entrance had proceeded no further. On the inside of the window there was a shutter which formed the true protection of the shop, and this it was only said that the panels had *endeavoured* to force or push up. The charge, therefore,

did not amount to more than attempt to commit house-breaking, and as such, could not be sustained. This case was clearly distinguishable from that referred to by the Advocate-Depute. There the *door* of the house having been broken through, no further barrier was opposed to the entrance of the thieves.

LORD DEAS concurred.

The objection was therefore sustained, and the second charge was struck out of the indictment.

The panels pleaded Not Guilty to the charge of theft by housebreaking. After trial, the jury acquitted M'Lymont, but found Sinclair guilty.

Sentence—Four years' penal servitude.

No. 102.
Thomas
Sinclair
and James
M'Lymont.
Glasgow.
April 21,
1864.

House-
breaking
with Intent
to Steal.

Judge—LORD NEAVES,

HER MAJESTY'S ADVOCATE—*Burn Murdoch, A.D.—M'Lean.*

AGAINST

JOHN DOCHERTY OR DOHERTY—*Morison.*

THEFT—PREVIOUS CONVICTION—FOREIGN—PROOF.—Circumstances in which, in a trial for theft aggravated by previous conviction, the aggravation held not sufficiently proved by the production of two extracts or certificates of convictions in Ireland, spoken to by an Irish constable.

The panel was charged with 'Theft, especially when committed by a person who has been previously convicted of theft.'

Among the productions libelled were—

No. 103.
John
Docherty.
Glasgow.
April 22,
1864.
Theft, &c.

An extract or certificate of a conviction of the crime of theft obtained against you, the said John Docherty or Doherty, under the name of Daniel Gallacher, before the Assize-Court held at Omagh, for the county of Tyrone, Ireland, on 27th February 1861; as also an extract or certificate of a conviction of the crime of theft obtained against you, the said John Docherty or Doherty, under the name of Daniel Gallagher, before the Assize-Court for the city and county of Londonderry, held at Londonderry, Ireland, on 12th March 1862.

No. 103.
John
Docherty. The panel pleaded Not Guilty, and the case went to proof. In regard to the Irish convictions—

Glasgow.
April 22.
1864.
Theft, &c. WILLIAM BAILEY deponed—I am head constable in the Irish constabulary [Shown certificates libelled]. These certificates apply to the prisoner. I was present at both trials, and saw him convicted and sentenced.

Cross-examined for the panel.—The first certificate is signed by the Clerk of the Crown for the County of Tyrone, and the second by the Clerk of the Crown for the County of Londonderry. I do not know whether the prisoner was convicted as an accessory before or after the fact. I have heard the expression, but I do not know what it means.

By the Court.—This is the way of proving convictions in Ireland.

MORISON, for the panel, contended that the public prosecutor had failed to prove the aggravation libelled. In a recent case, a certificate or extract of a conviction in England had no doubt been admitted in proof of a similar aggravation, *Janet M'Pherson or Dempster*, High Court, Jan. 13. 1862, Irvine, vol. iv. p. 143, but in that case the certificate produced was proved by the clerk of court in which the conviction was obtained, and by production of the record book containing an entry of the sentence. Here there was nothing but the extract convictions, spoken to by a person so ignorant as not to know what was meant by being accessory to a crime before or after the fact.

LORD NEAVES, in charging the jury said, that the proof of the convictions was to his mind most unsatisfactory. When a conviction had been obtained in Scotland, the evidence of a police-officer, who had been present at the trial, was, no doubt, sufficient. Greater strictness was required in the case of English and Irish convictions. In particular, the Court should be informed as to the precise nature of the crime of which the panel had been previously convicted. The Court were not bound to know anything of the Irish law of felony. In the circumstances, the safer course would be for the jury to find the aggravations not proven.

The jury found the panel guilty of theft, without the aggravations.

Judge—LORD DEAS.

HER MAJESTY'S ADVOCATE—*Crichton, A.D.*

AGAINST

MARGARET LYONS OF M'GONIGLE—*R. V. Campbell.*

BIGAMY—PROOF OF IRISH MARRIAGE—FOREIGN.—In a trial for Bigamy, a marriage alleged to have taken place in Ireland, *held* not to have been sufficiently proved, in respect the public prosecutor had failed to adduce evidence as to the Irish law of marriage.

THE panel, who was charged with Bigamy, pleaded Not Guilty. In regard to the first marriage, which was alleged to have taken place at Ballamoney, Ireland, it was proved that in August 1834, the Presbyterian minister in Ballamoney had performed a marriage ceremony between the panel and a man named James M'Gonigle, and that the parties had subsequently cohabited as man and wife; but the public prosecutor led no evidence as to the Irish law of marriage.

No. 104.
Margaret
Lyons or
M'Gonigle.
Glasgow.
April 25.
1864.
Bigamy.

The panel's counsel contended—The proof of the Irish marriage was insufficient. It had not been shown that the forms required by the Irish law had been observed.

The ADVOCATE-DEPUTE, in reply, referred to the Statutes regulating marriages in Ireland.

LORD DEAS directed the jury, that where, in a charge of bigamy, one of the marriages was alleged to have taken place in a foreign country (which Ireland was in questions of this kind), the law of that foreign country must be proved as matter of fact. The Crown having failed to do this in the present case, the panel was entitled to a verdict of not proven.

The jury accordingly found the charge not proven.
Sentence, *absolvitor*.

May 21.
1864.

HIGH COURT.

Present,

THE LORD JUSTICE-GENERAL.

LORDS DEAS AND ARDMILLAN.

ROBERT GRAHAM, Suspender—*Hamilton*.

AGAINST

THOMAS TODERICK, Respondent—*Gifford*.

SUSPENSION—VERDICT—SENTENCE.—A panel was tried before a Sheriff and jury, on a libel charging him with two separate acts of theft by housebreaking. The jury returned a general verdict finding the panel 'guilty of theft by means of housebreaking;' and the Sheriff 'in respect of the foregoing verdict, finds the panel guilty 'as libelled: Therefore sentences and adjudges him,' &c. Sentence suspended, on the ground that it proceeded on an ambiguous verdict.

No. 105.
Graham
v. Toderick.
High Court.
May 21.
1864.
Suspension.

THIS was a bill of suspension and liberation at the instance of Graham, who had been tried before the Sheriff-Substitute of Haddington and a jury, on a libel charging him with two separate acts of theft by means of housebreaking, aggravated by previous conviction of theft. The respondent, the procurator-fiscal, conducted the prosecution. The suspender pleaded not guilty, but the jury, after hearing the evidence, returned the following verdict:—

'The jury unanimously find the panel guilty of theft by means of housebreaking, and that he has been previously convicted of theft.'

The Sheriff-substitute (Shirreff) pronounced the following sentence:—

'In respect of the foregoing verdict, finds the panel, Robert Graham, guilty as libelled, aggravated by previous conviction as libelled: Therefore sentences and

‘ adjudges him to be imprisoned in the prison of Had-
 ‘ dington for the space of six months from this date,
 ‘ thereafter to be set at liberty, and grants warrant ac-
 ‘ cordingly.’

No. 105.
 Graham
 v. Toderick.
 High Court.
 May 21.
 1864.

It was alleged in the bill of suspension that no evi-
 dence had been led in support of the first charge in the
 libel. In these circumstances the suspender maintained
 that the verdict of the jury was ambiguous, and the
 sentence following upon it incompetent.

Suspension.

When the case was called for debate—

GIFFORD, for the respondent, admitted that at the trial
 evidence was adduced in support only of one charge.

LORD DEAS.—I am clearly of opinion that this verdict
 is ambiguous. The complaint contained two separate
 charges. It is admitted that in regard to one of them,
 no evidence was led. It is impossible to tell whether
 the jury intended to convict of one or other of these
 charges, or both. And when we come to the sentence,
 it only makes matters worse, for the Sheriff finds, what
 the verdict certainly does not express, that the prisoner
 is guilty as libelled. In these circumstances there has
 obviously been a miscarriage of justice, which I cannot
 doubt we are entitled to rectify.

LORD ARDMILLAN.—I am of the same opinion. It
 might have been a serious question whether there could
 be an inquiry into what took place at the trial, in order
 to review the verdict of the jury. I should have hesi-
 tated to hold such an inquiry competent. But the
 true state of the facts has been candidly and properly
 admitted. There is no question of evidence here. It
 is not said that there was defective or insufficient evi-
 dence. This is a case where it is the admitted fact, that
 upon one charge in the libel no evidence was led at all.
 The mistake was that the charge on which no proof was
 led was not withdrawn. If the verdict had borne “as
 libelled,” it might indeed have been read as a verdict
 applicable to the whole libel. But if so, it would have
 been read contrary to what, on the admitted facts, it did

No. 105. mean. As it stands, it is very ambiguous, and the
 Graham prisoner is entitled to the benefit of the ambiguity. The
 v. Toderick. Sheriff certainly made the matter no better.

High Court. May 21. 1864. THE LORD JUSTICE-GENERAL.—There has evidently
 Suspension. been a mistake committed here, of which the suspender
 is entitled to get the benefit. I concur in thinking that
 the sentence should be set aside.

The sentence was suspended, with expenses.

J. M. BELL, W.S.,—PARTY,—Agents.

THE LORD JUSTICE-GENERAL,

LORDS NEAVES AND JEEVISWOODE.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Young—Gifford, A.D.*

AGAINST

GEORGE BRYCE—*Fraser—Scott.*

MURDER—INSANITY—EVIDENCE.—A panel convicted of the crime of
 Murder notwithstanding a defence of insanity at the time the act
 was committed.

2. Circumstances in which objection repelled to the admissibility in
 evidence of statements made to a police-officer by the panel after he
 was in custody.

No. 106. GEORGE BRYCE was charged with the crime of Mur-
 George der :—
 Bryce.

High Court.
 May 30 and
 31, 1864.
 Murder.

IN SO FAR AS, on the 16th day of April 1864, or on one or other of
 the days of that month, within or near the house or villa situated at or
 near the village of Ratho, in the parish of Ratho, and county of Edin-
 burgh, then and now or lately occupied by Robert Tod, mill-master
 and grain-merchant, then and now or lately residing there, you the said
 George Bryce did, wickedly and feloniously, attack and assault Jane

Watt or Jane Seaton, now deceased, then a servant in the employment of the said Robert Tod, and residing in the said house or villa, and did violently take hold of her, and seize her by the throat, and did kick her, and otherwise maltreat and force her down, and got above her, and press upon her, and abuse her; and the said Jane Watt or Jane Seaton having fled from you, you did pursue her, and having overtaken her at a short distance from the foresaid house or villa, and near an old building commonly called or known by the name of the Old Distillery, you did, time above libelled, at or near the entrance to the yard or court of said Old Distillery, or near the door of the house there, in the parish of Ratho aforesaid, then and now or lately occupied by William Binnie, joiner, residing there, wickedly and feloniously, attack and assault the said Jane Watt or Jane Seaton, and did throw or knock her down, and did with a razor or other sharp instrument cut and wound her severely on or near the neck; by all which, or part thereof, the said Jane Watt or Jane Seaton was mortally wounded and injured, and in consequence immediately or soon thereafter died, and was thus murdered by you the said George Bryce: And you the said George Bryce had previously evinced malice and ill will towards the said Jane Watt or Jane Seaton.

No. 106.
George
Bryce.

High Court.
May 30 and
31, 1864.

Murder.

The panel pleaded generally Not Guilty.

On the motion of the counsel for the prisoner, and of consent of the Crown, the medical witnesses were allowed to remain in Court to hear the evidence adduced as to the facts of the case.

The general evidence was to the effect that, on Friday night, the 15th of April, the prisoner, who had not slept at home the night before, was put to bed by his father, being overcome either with sleep or drink. He rose about six on Saturday morning, and loitered for nearly an hour about the yard of his father's house, in the village of Ratho. Leaving that about seven he crossed the bridge over the canal, going along the road past the villa occupied by Mr. Tod. To his uncle, who met him on the road, and asked where he was going, he replied, 'to the station,' the road being that which led to the railway station. He spoke to a baker's boy, whom he passed on the road, after passing Mr. Tod's gate. Leaping the wall of the villa, he also spoke to Isabella Brown, who was at the back door, asking her where was 'Jeanie.' Getting no answer he went in at the back

No. 106.
George
Bryce.
High Court.
May 30 and
31, 1864.
Murder.

door and found his way to the nursery, where he found the deceased and immediately attacked her, throwing her down and struggling with her. She was rescued by her mistress, who called to her to run away. She did so but the prisoner followed, leaping the wall which separated the villa from the road, and having overtaken her he again threw her down, placing his knees upon her breast, and with a razor, which he had, cut her throat. The deceased was carried into a neighbouring house and laid on a mattress on the floor. The wound in her throat was bleeding dreadfully. She asked for some water ; but, when it was brought, she was unable to drink it, and she never spoke again, dying almost immediately. The prisoner, on leaving the deceased, endeavoured to make his escape, but was followed and secured. In the course of the chase he twice threatened to take his own life with the razor, and he tried to use it against those who followed him. In his judicial declaration, emitted a few hours after the murder, the prisoner stated that he remembered going to Mr. Tod's house that morning, but that he did not recollect of seeing any person at the house except Isabella Brown ; that he had no recollection of seeing Jane Seaton, or of doing anything to her. He recognised his cap, which he had left in the nursery, when shown him, and also the razor ; but denied having the razor with him when he went to Mr. Tod's house.

The only question involved in this case was in regard to the prisoner's sanity. The following is a full note of those parts of the evidence of each witness which bore upon this question :—

JOHN T. GORDON, *Sheriff of Midlothian*.—[Shown declaration libelled on]. It was freely and voluntarily emitted by the prisoner. He was then in his sound and sober senses.

Cross-examined.—I had never seen him before.

MAURICE LOTHIAN, *Procurator-fiscal*.—[Shown declaration]. I was present when it was emitted by the prisoner—freely and voluntarily. I had no doubt he was then of sound mind, and in his sober senses.

Cross-examined.—I had never seen him before.

MARGARET TOD.—The prisoner never said or did anything to lead me to suppose that he was insane. I never thought or heard such a thing.

No. 106.
George
Bryce.

High Court.
May 30 and
31, 1864.

Murder.

Cross-examined for the panel.—I never had any lengthened conversation with the prisoner. I often met him on the road. I generally nodded to him, and he always returned it if he saw me nod. I cannot say whether he was a shy man, or a sulky man. I found him particularly obliging about messages or the like. When I say shy or sulky, I speak from look or demeanour. He was quiet so far as I saw. About a year ago, I spoke to Jeanie Seaton about a report that she had called him a drunken blackguard. She was with me and the children out driving, and prisoner passed; I said, Jeanie 'it seems George Bryce is very angry with you for having said he was drunk. You need not be at all afraid, for if he says a rude word to you tell me, and Mr. Tod will put a stop to that.' She smiled and said, 'the strange thing is, I never said such a thing.' I never referred to that matter on any other occasion. When I seized the prisoner's wrist and he gazed at me, I cannot say whether he recognised me or not; he had a bold brutal look. His cap was off when I struck him on the head with the umbrella. He is one of a numerous family. His father and mother are most respectable.

JOHN YOUNG, *ploughman*, deponed, *inter alia*, I have frequently seen prisoner. I have known him for ten or twelve years, but have had very little conversation with him. I never saw anything about him different from other people. It never occurred to me to suppose that he was out of his mind.

Cross-examined.—I never was in the same room with him, merely 'good day,' or 'bad day,' in passing.

MRS. MARGARET HENDERSON.—I have known prisoner from his infancy. I never took a thought that he was wrong in his mind or different from other people. I saw him very frequently. My house is on the north side of the canal, near the bridge (Ratho), and just opposite to prisoner's father's house, which is on the south side.

Cross-examined.—I never had any conversation with the prisoner beyond saying 'a good day' when we met.

JAMES MACKAY, *constable*, on cross-examination, deponed—So far as I know, prisoner was not riotous except in his father's house after drinking. I have remonstrated with him afterwards about these scenes in his father's house. He always said he had no recollection of them.

To the Court.—I mean that he was a sort of silly—easily advised—easily led away. I mean that he was easily led away to go and drink with comrades. I never saw him do anything outre or uncommon when he was sober.

No. 106. ROBERT DAVIDSON, *blacksmith*.—I was at school with the prisoner, George Bryce. he is about the same age, 29 or 30. I was pretty intimate with him at school and since. I never saw anything in his conduct to lead me to think him insane. I never heard that he was mad. I never saw him so much the worse of drink that he could not take care of himself.

High Court.
May 30 and
31, 1864.
Murder.

PETER MILNE, *constable*.—I was stationed at Ratho in April last. On the 16th April, I got information that Jane Seaton was killed. I went and saw the body; I then went in pursuit of the prisoner. I saw him a little before 10 o'clock. On the road a number of men were round him, Davidson was one of them. I said to him, George you have cut a woman's neck.

Q. What did he say?

FRASER, for the prisoner, objected to any statement made by the prisoner to the officer after he was in custody being received as evidence, *Helen Hay*, Perth, October 8. 1858, Irvine, vol. iii. p. 181.

The SOLICITOR-GENERAL, for the prosecution, replied, that the evidence was competent, especially when the prisoner pleaded insanity, *Alexander Milne*, High Court, Feb. 9. 1863, Irvine, vol. iv. p. 301.

FRASER having been heard in reply—

LORD NEAVES said he was for repelling the objection. The constable was not acting unfairly, or beyond the limits of his duty. There was no special warrant for the apprehension of the prisoner—it was a hue and cry—the country was raised, and the man caught. He was told what the charge against him was, and the question is, whether the Court should exclude what he then said. I am of opinion that they ought not.

LORD JERVISWOODE was of the same opinion, it would be contrary to principle to exclude this evidence.

The LORD JUSTICE-GENERAL concurred.

The objection was repelled, and the examination resumed.

Prisoner said, 'she is cheap of what she has gotten.' He asked me if she was dead. I said no, I did not think so. I said so because I wished to take him as quietly as possible to the police-office.

The Court intimated an opinion, that evidence of

what passed after this false statement by the officer, could not be admitted, and it was not pressed by the prosecutor.

No. 106.
George
Bryce.

High Court.
May 30 and
31, 1864.

Murder.

JAMES CRAIG, *Surgeon*, F.R.C.S.E.—I have been a practitioner in Ratho since before the prisoner was born, and have known him since his infancy. I was not aware until October last, that he was addicted to drink—it was that time I saw him in the police-office. He had been riotous. I never saw anything to lead me to suppose he was wrong in his mind—he was like other people except when outrageous from drink. In October his father had come to me about his drunken habits, and the difficulty of managing him when drunk. When I saw him in the police-office in October, he was quite rational. I gave him advice about abstaining from drink. After that I saw him going about as usual. I was never consulted about him professionally after October last. I never had a doubt of his sanity. I have heard the evidence to-day. There is nothing in it to satisfy me that he is insane.

Cross-examined for the panel.—I have spoken to prisoner only twice. It was on the evening I saw him in the police-office. He was sober, but a little excited, which I attributed to his being apprehended. His father asked me to see him; prisoner said he did not recollect what he had done. He said this after I told him what he had done, when I advised and warned him, and spoke of his mother, he began to cry. I saw him the next morning in the police-office. He still denied all knowledge of what had passed at his father's house. I did not think the denial could be sincere. I did not direct my attention particularly to the state of his mind. I had a pretty long conversation with him. I next saw him on the 16th April last in the police-office. He then exhibited defect of memory. I asked what he had been about that morning. He gave no answer. I asked if he had been at Mr. Tod's. He said he had not. I asked if he had seen Jeanie Seaton. He said he had not. I was then under the impression that he was not aware of her death. I asked him when he saw her last. He said yesterday. I asked where, and he said at Gogar Mount Lodge, and I then remembered having driven past him. I asked if he remembered the advice I had given him in October. He said he did. I asked why he had not followed them. He made no answer. I then asked if he was certain he had not seen Mrs. Tod that morning. He said he had not. My object in putting these questions, was chiefly to satisfy myself as to his sobriety. I asked where he had been all that morning. He said 'asleep in the plantation.'

Re-examined.—I satisfied myself that he was quite sober and perfectly intelligent.

No. 106.
George
Bryce.
High Court.
May 30 and
31, 1864.
Murder.

DR. LITTLEJOHN, *Police Surgeon*.—I saw the prisoner on the 16th April in the police-office, Ratho. He was quite sober, and appeared to be in his sound senses—quite rational. I had no doubt of it. Dr. Craig put several questions to him, and after Dr. Craig left, I put two questions. I asked if he was aware that killing another was a crime. He said he was. I asked if he was aware that a person was punished for committing such a crime.—he nodded acquiescence. The Sheriff had desired me to ascertain his state of mind before he examined him. I was satisfied that he was in his sound and sober senses. I have heard the evidence to-day. I have heard nothing to lead me to any different opinion.

Cross-examined.—I never saw the prisoner before the 16th April, or since. My opinion was deduced from the way he answered questions put by Dr. Craig and me, and from watching his demeanour. I had heard that he was addicted to spirits, and that it was important to see that he was not suffering from the effects of drinking.

[Declaration read].

WILLIAM BINNIE jun.—I live at the entrance to the Old Distillery, Ratho. On the 16th April I saw the prisoner between 7 and 8 morning, on the north side of the bridge over the canal. I spoke to him. He asked me about a wooden house I was putting up in the manse garden. I thought he was sober. I did not doubt it. He spoke plain enough to me; we parted at the north side of the bridge. He went in the direction of Tod's villa, and I went towards the village. About ten or fifteen minutes after that I heard of the murder, and went to my father's house and saw the body. I was present when the prisoner was brought to look at the body in presence of the Sheriff. I was at school with the prisoner, and have known him ever since. I never saw anything in his conduct that led me to think that he was insane; such a thought never occurred to me. On the morning of 16th April he had on his light shoes.

Cross-examined for the panel.—When I told him that the wooden house was a photograph house, he gave a smile. He was not a man who said a great deal when you spoke to him.

The following witnesses were examined for the defence.

JAMES WIGHT.—I was one of the county police, and am now market officer at Corn Exchange, Leith. In 1857 and 1858 I was seventeen months stationed at Ratho, after that I went to Currie, and then to Portobello as police-officer. At Ratho I knew the prisoner. I have had occasion to notice his state of mind at various times. During the 17 months I was at Ratho he had a great want of mind. If I had met him, and said 'a fine morning,' he would have given a

peculiar shake of his head and said, 'you're a funny ane.' If I asked him about any particular matter, he would commence to answer me, and after speaking about a dozen words he would make a dead halt, and go off on some other subject. His talk was rambling—in one conversation he would refer to many subjects. About the end of 1857, one night between 7 and 8, I went out to speak to the Dalmahoy gamekeeper, who was standing with two of the footmen and the prisoner. As I approached them, one of the footmen tapped the prisoner on the shoulder, and said, 'George, you was wrong this time.' Prisoner drew a clasp-knife from his pocket, opened it, and swore he would stab to the heart any man who would say that he was wrong. Before this they were all laughing. When prisoner had the knife in his hand he appeared very wild. I ordered him to shut the knife and give it me. He did so. I then ordered him home, and took him home. He went quite peaceably, and never said a word. I went with him to his father's house. He went through the kitchen, and into a small room, and went to bed, speaking to no one. His mother and father were in the kitchen. He was perfectly sober. I took his father outside, and told him what had occurred, and that if he did not keep a watchful eye over him, he would do something that he would repent of. Next day I met the prisoner on the public road. I referred to what had taken place the previous evening, and asked him what he meant by drawing a knife to stab the footman from Dalmahoy. He denied all knowledge of it, and said that I was only shamming with him. He was sober at that time. I thought he was pretending want of recollection. I made enquiry of several people whether he was right in his mind. They said, yes, but he was thoughtless, and did not care what he did. Some time after that I went into his father's house, when his father was reprimanding him severely for something he had done. The prisoner went out of the house. I left it also. Two days afterwards I was passing his father's door, the father and mother asked me if I had seen or heard anything of him. I had not seen him. His father said, he had heard nothing of him since he left the house. I went with his father to the stables, and found the prisoner lying underneath the hay, and nearly exhausted. He was not able to rise, he said he was only taking a rest to himself. A lad Clark picked up a knife from where prisoner was lying. Clark asked him what he was going to do with the knife. He said he was going to cut his throat—he gave him some food in the stable, and took him to the house, and he went to bed. He frequently wandered away from home for days. Both his father and mother appeared to try and get him and take him home. He was on one occasion absent eight or nine days. On one occasion I saw him walking to and fro in Norton Wood. I asked what he was doing there, he said he was taking a walk to himself. I asked him to go back with me to his father. He did so. He appeared worn out and fatigued. He was sober. He had been absent eight or

No. 106.
George
Bryce.

High Court.
May 30 and
31, 1864.

Murder.

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No. 106.
George
Bryce.

High Court.
May 30 and
31, 1864.

Murder.

No. 106. **DR. LITTLEJOHN, Police Surgeon.**—I saw the prisoner on the 16th April in the police-office, Ratho. He was quite sober, and appeared to be in his sound senses—quite rational. I had no doubt of it. Dr. George Bryce. Craig put several questions to him, and after Dr. Craig left, I put two questions. I asked if he was aware that killing another was a crime. He said he was. I asked if he was aware that a person was punished for committing such a crime.—he nodded acquiescence. The Sheriff had desired me to ascertain his state of mind before he examined him. I was satisfied that he was in his sound and sober senses. I have heard the evidence to-day. I have heard nothing to lead me to any different opinion.

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 George his cart he was the reverse of careful. If any one spoke to him on
 Bryce. the road he would stop and speak, and allow his horse and cart to go
 High Court on. I have on several occasions heard him speaking to himself while
 May 30 and going along with his cart. I never made out what he was saying.
 31, 1864.
 Murder. When I ordered him to do anything he did it at once, or when his
 father ordered him. In 1859-60 I went to Portobello, and was there
 one year and eleven months. In the year 1861, I met the prisoner
 at Portobello. I had received a letter from his father stating that he
 had been absent from home for some time drinking, and if I saw him,
 I should send him home. I also got a message to that effect from his
 father by the drayman. After that I met the prisoner in Portobello.
 He appeared to have been fatigued, and to have been travelling. He
 was coming from the direction of Musselburgh. He said he had been
 taking a walk. I took him to my house, and gave him dinner. He
 ate it very ravenously. I took him in afterwards to Edinburgh, and
 saw him off by the Ratho coach. I have heard boys in Ratho say to
 each other when prisoner was seen, 'here comes daft Geordie Bryce.'
 If he had any money, he would take the lads of the village into a
 public-house and spend all his money on them in drink. I have taken
 him out of a public-house, and sent him home, on several occasions.
 His father and mother are very respectable.

Cross-examined.—When the prisoner drew the clasp-knife and said
 he would stab with it, I did not consider him insane, but I thought he
 had a want of mind. I made no report of this to my superior. As
 the footman lodged no complaint, I thought I had no business to inter-
 fere. I thought he was not a safe man to be at large, but I gave no
 information. I left the police force about seven months ago of my own
 accord. I left at a minute's warning, because I thought Mr. List, the
 Superintendent, did not give me satisfaction. I complained to him
 that one of the body had struck me, but he gave me no satisfaction, and
 threatened to dismiss me. I was once reported for drunkenness and
 fined. After I left the County Police, I went to the Leith police. I
 was dismissed from that force on the allegation that I gave prisoners
 drink. After I left the Leith police, I went to work in the Docks.
 The time prisoner threatened to stab the footman, was the first time
 I saw him do anything wrong. The next thing I saw wrong was the
 finding him in the stable early in 1858. I have heard people say he
 was given to drink, but I never saw him the worse of drink, or that
 I could say he was after a bout of drinking. It was on a subsequent
 occasion I heard his father scolding him. I don't know whether it
 was for drunkenness. The father's house is a public house. It was in
 1858, that I found him in Norton Wood. His father never complained
 to me of his drinking. It was at his mother's request that I took him
 out of the public-houses. Norton Wood is a belt of plantation. I

saw him four or five minutes before I went up to him—he said nothing irrational to me. He went home with me when I asked him. The only other thing was the finding him in Portobello. There was nothing mad-like in his conduct on any of these occasions. The only daft-like thing I ever saw him do, was that about threatening the footman. The only foolish thing I ever heard him say, was the threat to stab the footman, and saying that he intended to cut his throat. He was absent in his talk and rambling, as I said already.

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Re-examined for the panel.—I have been three months in my present situation. Lord Morton's servants asked me not to apprehend prisoner, as it would be the means of their losing their situations for having come there against orders. I should think a man was not right in his mind if he lay two days under hay when he had a good house beside him. I have found him incapable of keeping up a connected conversation on any one subject. That was the only difference I could see in his talk from that of other people.

JAMES MEIKLE.—I am Station-master at Gogar. I have known the prisoner for eight years. He has been in the habit of driving coals to the station, and at times attending to the sales of the coals. I have frequently conversed with him—he appeared to have an impediment in his speech. He did not enter much into conversation. He sometimes came into the station and did not speak to me. At other times he would come in squaring his fists. Sometimes he would pull my whiskers, and say, 'you're my prisoner, sir,' 'come along with me, sir,' 'what's this you have been about, sir.' I sometimes humoured him, at other times I had not time to be bothered with him, and pushed him away, and he would go away laughing. He often called me Colonel Meikle, or Sergeant Meikle. He often asked after my wife, though he knew I was not married. He often appeared unable to give utterance to his thoughts. I would not have trusted him with anything about the railway. I would not have trusted him with the moving of the points. I ordered that he should not be allowed to meddle with them. I believed that he had not mind enough for the work. I would far sooner have trusted a child ten years of age. I always considered him half-daft. He often looked up to the sky with his mouth generally open. I have seen him walking 100 yards behind his cart and gazing up in the air; and I have been within a foot of him before he observed me. I always found his memory very defective. He always neglected to execute orders as to coals. He had a good temper—very civil and obliging. I never saw him under the influence of drink. When at the station he did not associate with the porters and others—generally was alone—would go into a corner, and stretch himself out on a form. His general manner was silly.

Cross-examined for the prosecution.—I mean his manner to me. He always knew me, and that I was not colonel or sergeant, but station-master. I think he always understood what I said. I always under-

No. 100. stood what he said. I don't suppose he was under any delusion. He
 George was too familiar. I have seen him after his cart was loaded allow
 Bryce. the horse and cart to go round to the passenger-station, about 800 or
 High Court. 900 yards, and he went himself a short cut along the line. I don't
 May 30 and think a sane man would allow his horse and cart to go 800 yards with-
 31, 1864. out him. I never saw him behave in that way to any one else.

Murder.

JOHN BRYCE, *father of the prisoner*.—The prisoner is one of a family of fourteen. From his youngest time he was always different from the others. He made very little progress at school, and I took him away from it. His peculiarity increased as time went on, but more so within the past few years. I noticed a change for the worse upon him about ten years ago, when he joined the militia. He was enlisted for five years; and was absent from home at first for about a year and a-half, and then occasionally for a few weeks at a time. I set him to drive my carts. He was sometimes at the farm, but very seldom. I never tried him at anything else. He was very easily affected by drink; two glasses of whisky would have put him mad. When he got the length of three or four glasses he generally fell asleep. After this a change for the worse came over him, he continued as before to wander away from home. He was away often for a week or a fortnight at a time. Sometimes I knew he had no money. He never told me where he had been; but I often heard from people who had seen him wandering about. On these occasions, when he returned he looked as if he had had many a hungry belly. On Sundays the family took their meals together in the parlour, but the prisoner preferred to eat by himself in a corner of the kitchen. About three years ago he appeared to be more peculiar. He became very restless both night and day. At that time he began to drink a good deal; but a change came over him about a twelvemonth ago. Since then I think he has been drinking less, and he has fallen off in his body. I have often heard him muttering to himself. In October last he had a fit of drinking, and became very outrageous. I required to get him handcuffed. I asked the policeman to take him to the station-house, for safety. When his hands were shackled, he went to the room, and lifted a razor. It was taken from him. I went for Dr. Craig, and asked him to go and see the prisoner, because I thought there was something wrong with his mind. I have known him leave his horse and cart standing at Ratho Station, and go away, without returning, for several days. The horse and cart were taken to the quarry. I remember of his putting on his black clothes on a Sunday. About three years ago I went with my son-in-law to the stable. My daughter, Mrs. Wilson, told me that George had told her he was to do something to himself; that in ten minutes he would be in eternity. The stable-door was locked. I assisted Wilson in by the hay-loft, and he opened the door. I saw a rope in Wilson's hand. We brought away the prisoner, took him home, but he would not rest, and we tied him to

his bed. On one occasion he wished to get into a room for his clothes, to go to Edinburgh, but his mother prevented him getting them, by locking the door. He attempted to jump out by the window, but I seized him and pulled him back. For the past twelve months his brother William has slept with the prisoner. He was very unwilling to do so. On the Wednesday night before Jeanie Seaton was killed, the prisoner did not sleep in my house. On the Thursday morning I found him lying among some straw in the byre. He did not sleep in my house on the Thursday night; but came out of the byre on the Friday morning. He went to his work between six and seven on Friday morning. I had been from home on the Friday, but came home between six and seven, and found the prisoner sitting in the front room. I could not say whether he was sober. He went to bed between seven and eight o'clock. I rose at two o'clock, and went into his bedroom. He was lying with his head towards the foot of the bed. I rose again at five o'clock, and he was then lying properly. His brother, William, got up about five, and the prisoner about six o'clock. I saw the prisoner after he rose, but he said nothing. I did not see him leave the house. Afterwards a girl, named Isabella Brown, came for me to the house. My wife's maiden name is Agnes Fraser; her mother's name was Catherine Nimmo. She had a brother named John Nimmo, whom I knew. He was not right in his mind. This John Nimmo's mother's brother's son was a minister, and went to America. John Nimmo's mother had another brother, who was not right in his mind.

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MRS. BRYCE, *the mother of the prisoner*, deponed to much the same effect.

MRS. WILSON, *examined by Mr. Fraser*, deponed—I am a sister of the prisoner. I remember about three years ago of the prisoner coming into my house in Ratho on Saturday evening. He sat for about half an hour, and when he rose up to go away, he said that in less than half an hour he would be in eternity. He then went away, and I went and told my father and mother what he had said. I told my husband before going to my father, and he went away to my father's after I came back.

WILLIAM WILSON, *porter, Ratho station*, deponed—I remember on a Saturday night, about three years ago, my wife told me her brother had been at my house, and said she was to look for his corpse in half an hour after that. I went down to the stable below my house. I found the door locked, and I went in through a hole above the door. I found George Bryce with a rope round his neck. It was tied to a beam. I took the rope off his neck, and went for his father, and we took him out by the hole by which I had entered. We could not get the key. He was in the loft above the stable, and the rope was tied to the beam, and round his neck. It was just above the hatch-hole. The rope had a running noose upon it. I recollect, about two years

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ago, of his lying two days among hay in the stable-loft. I went to him several times, and asked him to come into the house. He returned me no answer. He got no food that I knew of during these two days. *Cross-examined by the SOLICITOR-GENERAL.*—I went to the stable because I heard him lock the door. Did it not sound strange to you that he should tell you to come and look for his body in half an hour? Yes. It did not look much like an intention to take away his life? I don't know. You never heard of a suicide giving people notice to come and look for his body in half an hour? No. When you went to seek him you found him on his legs? Yes. He was the worse of drink, but not much. I don't think he had become much addicted to drink by that time. He got worse afterwards. He was very violent when he got drink. I always noticed him weak in the mind a little. If you put a question to him, you never got a right answer from him.

JAMES DICKSON, *pointsman, Ratho station*, deponed—I know the prisoner. I was at school with him, and have known him all his life. I thought he was deficient in mind. I remember on one occasion that he turned his horse and cart right round in the way, when an engine was shunting trucks. He was deficient in memory. His mind appeared to wander. That condition of mind has grown worse since June 1863. He did not seem to be so tidy about himself. He seemed to become more silent. Before that we often walked together, but since that rather seldom. He rather shunned my company since that.

Cross-examined by the SOLICITOR-GENERAL.—I have seen him send his horse away from the station, and did not follow it himself. This was about the 'daftest like' thing I ever knew him do. He made very many mistakes. Interrogated, Will you tell us one? I gave orders to send my trunk to the station, and it never came. Who did you tell? Somebody connected with the house. Did you speak to the prisoner about it? Yes, afterwards. Let us know the biggest mistakes he ever made? He quarrelled with his father about putting the horse's bit in its mouth, and although he was wrong he would not admit it. Will you give us an instance of how he answered one question by referring to another? I cannot exactly do that.

DR. LAYCOCK.—I am Professor of the Practice of Medicine in the University of Edinburgh. I have examined the prisoner twice in the prison, on Wednesday last the 25th, and yesterday. I subjected him to a minute examination on both occasions, with a view to ascertain his mental condition. His physical organization is of a low type. We judge of that by the form of the head, the jaws, the articulation. He has high superciliary eye-ridges, and receding forehead. His articulation is thick and indistinct, as is often the case with persons of low organization. I have heard the evidence to-day. I do not think him a man in his sound senses just now. I think he was not of sound mind at the time he committed the deed. I think he was labouring under a fit of maniacal excitement; such a fit may come on suddenly,

and go off suddenly. That is not uncommon in homicidal mania. It is one of the characteristics of the fit, that the person does not afterwards remember what he did under the fit. After the fit went off, the prisoner might have appeared to ordinary observers as rational as he was before the fit. My conclusion is deduced from the facts laid before the Court. I think that for some years he has been more or less in a morbid state mentally. I consider that about twelve months ago he began to suffer a further change of a marked kind, which we term 'chronic dementia,' and which in similar cases has been observed to pass into complete dementia. Then the suddenness of the attack, without any apparent immediate exciting cause, the fact that the symptoms detailed indicate that he was of a class of individuals that would suffer that kind of paroxysm. The conduct of the man during the fit and after. Such cases of homicidal mania are characterised by impetuous, regardless fury as here. After the deed is done, the patient has no recollection of what he has done during the paroxysm. I think he would be the more excited by the blows he received on the head from the umbrella. Homicidal and suicidal mania are often combined in the same person. When I saw the prisoner yesterday, he did not remember that he had seen me on Wednesday. I think he did not pretend to be insane in the prison. I was sure he was not feigning. It is generally held that a person in whose family insanity has appeared, is more predisposed to insanity than one in whose family there has not been any such appearance.

Cross-examined for the prosecution.—I assume that the fit came on upon the Saturday morning, when he was passing Mr. Tod's house. A fit begins when the acts begin. Here the acts began when he rushed towards the person, and along the lobby. I assume that the fit must have passed off between the moment the deed was completed, and the time when Davidson came up to him. If he had been running for about an hour, or an hour and a half before Davidson came up, I can give no opinion whether the fit was off at that time. That would not interfere with the opinion I have given. The running away might be owing to some fear—some delusion—some apprehension. I think his attack on the girl had something to do with his previous enmity. It was not to gratify his enmity. It was a delusion that she had slandered him. I think he was probably unconscious of what he was doing. I have no opinion as to whether he knew where she was when he attacked her. I have no medical opinion as to whether he knew what he was doing. I have no opinion as to whether he thought what he was doing was right or wrong. I think he did not know what he was doing, as he was afterwards unconscious of what he had done. I think he was under a delusion that Jeanie Seaton had called him a drunken blackguard. He also told me he was engaged to be married to Isabella Brown. I think that was also a delusion. I have known such delusions mentioned in cases of insanity. It is a very

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 George known cases of insanity in which there were no greater delusions. If
 Bryce. that about Jeanie having slandered him is not a delusion, there is no
 High Court. delusion in this case. He had a delusion that his father's house was
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 Murder. imbecile in memory and judgment. He had no memory at times. It
 would make no difference, in my view of the case, if he was under the
 influence of drink. When a man broods over a fancied wrong, it be-
 comes a delusion. It would produce a feeling of enmity, and might
 lead to a fit of maniacal excitement, under which he might cut his
 neighbour's throat.

Re-examined for the Prisoner.—I think that he had a tendency to
 this fit on Saturday morning before he came to Tod's house. The
 sleeping in the byre on Wednesday and Thursday indicated a morbid
 condition. In giving my opinion, I have taken into consideration all
 the facts I have heard in evidence. When lunatics commit a wrong
 act, they frequently run to hide themselves. If he is unconscious that
 he has done it, he has no reason to escape.

To the Court.—It is not uncommon for a lunatic to announce his
 intention to commit suicide. It is also not uncommon for a lunatic to
 announce such intention, and yet not to do the act. I think the pri-
 soner is insane now.

DR. ROBERT RITCHIE.—I was Resident Medical Officer at Bethlehem
 Asylum, London, for three years and seven months. There were
 about 300 patients on an average. I left in March 1861, to practise
 in Edinburgh. I am Physician to the Dispensary. I have examined
 prisoner three times in prison—18th May, 23d, and 25th May—also
 this morning. I heard the evidence yesterday. I would call the
 prisoner a man of low mental organization. I subjected him to a long
 examination. I took him over his whole life, so far as I could trace
 it from his description. I asked him whether he considered himself
 sane when he attempted suicide. He said he did not know—could
 not say. From merely examining himself, I would come to the con-
 clusion that he was decidedly insane. The facts in the evidence yes-
 terday that struck me most were—that he became decidedly worse
 three years ago, and there was a further change about one year ago—
 the last was to my mind an evidence of delusion. Apparently his
 bodily health became worse then—he was sleepless and feebler—there
 was increased restlessness, and a change to melancholic condition—
 attempts at suicide. Restlessness and sleeplessness occurring, as they
 did in this case, I regard as being evidence of cerebral disease, and I
 have frequently noticed that in patients. I regard sleeplessness as
 rather indicating incipient disease, though it occurs in all stages of in-
 sanity. Suicidal and homicidal mania are frequently combined. So
 persons under homicidal mania frequently, with great skill and cunning,
 secrete some instrument to effect the death of some person they

bate, and frequently wait for an opportunity of effecting their purpose. Is it common for a maniac after committing homicide to endeavour to escape from punishment? I understand it is so, but I cannot answer from my own experience. Is it not uncommon for a lunatic who has done an act to endeavour to escape from punishment? I have known that from experience. Is it a very common delusion in lunatics to suppose themselves slandered? I do not think the prisoner was of sound mind at the time he committed the act in question. I think he was under a maniacal paroxysm. I think he had a tendency to that condition before he left his father's house that morning. I think that passing Tod's gate excited his remembrance of the girl, and that that had brought on the paroxysm. After such paroxysms it is common that the lunatic has no remembrance of what he did. I have no doubt that he was under a paroxysm of mania in October 1863. I would have recommended restraint. I think that the scene with Lord Morton's servants was an indication of impulsive tendency. The progressive indication afforded by his leaving his horse and cart—his gazing to the skies—his muttering to himself—lead me to think that he was gradually becoming insane—the disease appeared to progress. From the evidence, and from what I have seen in my own examinations, I think that the case would gradually progress towards *dementia*. I mean that it would end in total loss of intellect. I think he is now in a quiet state, but the delusion still exists. I consider him insane.

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Cross-examined for the Prosecution.—Dementia is one of the three forms or divisions of insanity—mania—monomania—and dementia. I consider prisoner to be a monomaniac, and was so on the 16th April. I think he became so about a year ago. I think that the subject of his monomania has always been the same—the same delusion, namely, the delusion that Jane Seaton had made certain statements regarding him, and which apparently she never made. I am not aware of any other delusion—no proof of any other—though I suspect that there were others. Although the supposed delusion was not actually a delusion, I would not say that he was not a monomaniac. There are other evidences of progressive change in his mind. Delusion is an essential of the monomania. I think that his desiring to be alone on Tuesday, if inquired into, would be found to be owing to suspicion of his family. I cannot say in what respect. I draw this inference from my knowledge of other cases. I don't think it was apprehension that his family would do him harm—more likely that he thought his family had offended him, and that he disliked them without any real cause. The muttering to himself also indicates delusion—a fancy that some one was speaking to him. These suppositions have not influenced my opinion. It is founded upon the delusion as to Jeanie Seaton. If that was not a delusion, there is no delusion for my opinion to rest upon. It is essential to my opinion that he was labouring under that delu-

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sion. He was capable of entertaining a feeling of enmity and ill-will against a particular person for a long time, and of entertaining a desire to gratify his ill-will by doing injury to that person. I cannot say whether at the time he inflicted the injury his mind was competent to understand the true state of the circumstances under which he acted. There is no fact in the case to lead me as a medical man to the conclusion that his mind was not competent to understand the state of the circumstances. I have no reason to doubt that he knew the girl to be the person he supposed had injured him. I believe it was in consequence of that feeling of certainty that he attacked her. I think he was under delusion—the feeling of enmity proceeded from the delusion. It was evidently his intention to kill the girl when he applied the razor to her throat. I cannot say whether he thought it was right or wrong to kill her.

Re-examined for the Panel.—It is very common for lunatics to entertain a feeling of enmity and ill-will; it is often a prominent characteristic—they know the person against whom they entertain the enmity. Homicidal attacks often arise from enmity arising from such delusion. A case of this kind occurred to myself from a patient entertaining such a delusion and enmity in regard to me.

This finished the evidence for the defence.

The SOLICITOR-GENERAL, for the prosecution, and FRASER, for the prisoner, addressed the jury.

The LORD JUSTICE-GENERAL charged the jury. In the course of the charge, he said:—Insanity, in a general sense, may be of various kinds. It may be imbecility or fatuity. That is not the case before you. Or it may be violence—a mania leading to violence, which is said to be the case before you. That may be of various kinds, but what we have to deal with here is said to be monomania. It is said that in a paroxysm of that disease the prisoner committed the offence. The disease is what constitutes the unsoundness, and the paroxysm is only an event in course of the disease. Now, the opinion expressed in substance by both the medical gentlemen is that he was at the time under an insane delusion—a delusion which shows that he was insane—and that it was acting under that delusion that led to the perpetration of the act, and that in consequence he is to be regarded as a person not responsible for it. I think it was said, especially by Dr. Ritchie, in the concluding part of

his evidence, that the only delusion proved was the delusion he was labouring under in believing that a man of the name of Peat had told him that Jeanie Seaton had said he was a drunken blackguard. I need not tell you it is not every eccentricity that is a defence against the perpetration of a crime. It is not the mere circumstance of oddity that will be a defence against a criminal charge. It is not that the intellect is more or less weak that can constitute such a defence. The defence in the present case is that he exhibited an insane delusion, which insane delusion being acted upon, led him to the perpetration of the offence, and that therefore he is not responsible. Delusions may be of various kinds. There are delusions which are clearly indicative of insanity. There are cases of men and women who have believed themselves to be some great persons of antiquity, of men who believed themselves to be constituted of particular materials, of men who believed themselves to have existed before the flood ; and there is also the case of a man who believed himself to be the Deity. All these strange, supernatural ideas, if they be really entertained, are conclusive evidence of insanity. There is no doubt of that. But there are other kinds of delusions which are not evidence of insanity. A man labouring under a mistaken belief respecting himself is not necessarily insane. A man believing that another has an ill-will towards him is not therefore insane, however ill-founded the notion may be. There are various errors of judgment, leading to wrong inferences, deduced from facts observed—strong opinions entertained on insufficient grounds, leading to erroneous conclusions. These may be called, more or less, delusions, because there is no good foundation for the opinions that are entertained. But delusions of that kind are not such as will screen a person who, on acting upon them, has perpetrated a crime. If you choose to call that insanity, still it will not do. It is not an insanity of this kind that will be a defence against the consequences of such an act as this. Now, what is

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the nature of the case ? The nature of the case here is this, that this man believed that Jeanie Seaton had said to Margaret Gibson, who had repeated it to Peat, that he was a drunken blackguard. Now, Peat says that he never told that to the Prisoner, and Margaret Gibson says she never told that to Peat, and that Jeanie Seaton never told that to her ; so that the chain of communication so far as the witnesses go, is broken. But supposing that he is under the impression that he heard it from that source, and supposing it was not true, it does not necessarily follow that he is insane, so as to be irresponsible. It appears that the opinion was entertained at Mr. Tod's villa by some of the people there, that the prisoner was a person addicted to drinking ; and it does appear that Mrs. Tod had told Jeanie Seaton—had told the servants, all of them—that if he was a person of that kind, his visits ought to be discouraged. It does appear—as probably you will be satisfied—that Jeanie Seaton had entertained the opinion that he was a worthless, drunken fellow ; and it is very likely that she may have said so. It would appear from the evidence that she had said that to her mother and to her father-in-law ; and it is very probable that such was her opinion. It may have been true that she influenced the opinion of Lizzie Brown, to whom he was paying his attention. That story may or may not have got circulation so as to come to his ears. He may have drawn conclusions that this was her view, and that she had been stating it. He may have been, in believing the delusions, labouring under mistake as to Peat being the person who told him ; it may have been somebody else that told him. But is that to make him irresponsible for the act of murdering Jane Seaton ? If a man has a delusion on any matter, however slight or frivolous, is that a reason for absolving him from the penalties of the law when he has incurred them ? We must consider the consequence of absolving persons that are without restraint, of absolving them from the effects of the law when they commit acts of

violence : and it is for persons so pleading insanity, to make out something that is a good answer to the charge. Is it a good answer to say—"I was under the delusion that Jeanie Seaton had entertained the opinion of me that I was a drunken blackguard, and had expressed it to others ; and I was under the delusion that I heard it from Peat, who got it from Gibson ?" I am of opinion that that will not do. The delusion must have reference to something far more serious and far more warranting and prompting to the act. If a man is under the delusion that another is assailing him to take away his life, then he may be justified in retaliating by taking away the life of the person who he believes is attacking or plotting against his life. But that a person has merely the idea that some one has said something of him, which he himself probably is conscious is not unfounded—to hold that as an excuse for taking away the life of that person is quite out of the question. It may be an indication of insanity taken with other matters, but it is not so standing by itself. But would you require to have it established beyond all doubt that the delusion, whatever it was, or the belief, was wholly groundless ? Would you require to have it established that nothing of the kind took place ? You are asked here to go into that inquiry, and on doubtful evidence to decide whether she ever made that statement in regard to him ; and then, on the result of that inquiry, you are to build this theory of insanity, and on this theory of insanity, in reference to a matter so trifling, the man is to get impunity who commits murder.

Gentlemen, the question of insanity—of insanity to the effect of relieving a party from responsibility—the question of whether a man is insane or not, is a question for you to decide. It is a question on the whole fact of the case ; it is not a medical question. The medical gentlemen have opportunities of observation which make their testimony frequently very important in reference to such matters ; but the question

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is not a medical question ; it is a question of fact whether the insanity amounted to this, that he was doing a thing which he himself considered, and had grounds to believe, and respecting which his belief was a sincere one, that he was warranted in doing—whether he really believed that something had occurred which would be a ground for taking away the life of this unfortunate girl. It is a question for you whether his state of mind was such as to warrant you in sustaining this defence. It is no doubt true that, if the result of your inquiry should be that the prisoner committed this act in a state of insanity, he would not be let loose on society. The public must be protected against persons who have uncontrollable passions, but I can by no means endorse the doctrine that seems to be held, that when a man cannot control his disposition to do an act he is not responsible for it. Nothing is more common than a person being unable to control his passions. His passion gets the better of him, and he becomes for the moment beyond control. But merely because you call it a paroxysm of monomania, that is not a reason for holding that such persons are to be held as out of the pale of the law in regard to answering for the consequences of the crime they commit. But the result would be—if you are of opinion that he is insane—immediate restraint, and, as prisoner's counsel said, possibly subsequent restoration to society. But no matter for that ; the question you have to decide is, has it been established or has it not, that this act was perpetrated through insanity,—insanity in this sense, that the party was bereft of mind, that he believed, from grounds that acted upon his imagination, that facts had occurred which warranted him in committing violence against the individual. The prisoner is said to have no recollection whatever of what happened, and that want of recollection is said to be a very common sequel to a paroxysm of mania. It appears that when he left his father's house he had taken with him a razor. It appears that he met some people on the road, that he met

a baker's boy not far from Mr. Tod's villa, and that when he met him he passed on beyond the house, and entered the grounds, it is supposed, further up by climbing the wall. Now, it is remarkable that, while he states that he does not recollect what he did to this woman on that morning, he did recollect that he had gone to Mr. Tod's house. He did recollect that he had seen the cook in the premises, and that he did recollect he had been in the kitchen. He knew that the razor which was exhibited to him was his, and he says he does not know how he came by it. In short, he pleads want of recollection of the particular act that he did in committing the murder, or of the possession of the particular weapon, but he remembers all the other circumstances of the case. If he was not in this state of mental aberration when he left his father's house, or until he got to the house of Mr. Tod, it is strange he should not recollect how he got the razor. He recollects perfectly well having seen Hunter, and having been in the kitchen; and when he had committed the last assault on the deceased, and cut her throat, he immediately fled. He was pursued, but was apprehended and taken back; and when spoken to by the constable, he remarked that she was cheap of what she had got, and asked if she was dead. This is not like evidence of a total want of recollection. The allegation of want of recollection is one thing, the proof of want of recollection is another. It is not proof that a man does not remember that he says he does not remember; and if he remembers things occurring about the time, but abstains from giving any information as to the particular thing he is charged with, you will judge how far you are to take that as a total want of recollection on his part. But this want of recollection is not a very unfrequent thing on the part of persons accused of crime. I have said that he carried on his ordinary vocation as a carter, and I think it is also in evidence that he was in the militia, and that he was out on duty for weeks at a time; and we have no evi-

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dence that he was incapable of performing his duties there—nothing of that kind. There is no proof that he was an imbecile, or that he was not trusted in the work which he did perform. Sometimes, it is said, he left his cart in jeopardy ; sometimes he left his horse and cart altogether, and did not appear for days. He is a person, it appears, of erratic disposition—and this tendency may account for all that—but that he did carry on his occupation, and that he was regarded by those persons who came in contact with him as perfectly competent to do these things, and not as a man who was exempt from responsibility for the consequences of his acts. Is it, then, the case that he suddenly becomes insane, that he could no longer be held responsible for his acts?—that is a question for you to consider. It is not enough that the evidence shows him to be a man of unsettled disposition ; that will not exempt him from being responsible. He is guilty, unless you hold him to be insane. If you are of opinion that he is insane now, it is your duty so to find ; it is your duty to say so separately, and without pronouncing any opinion on the question of guilty or not guilty. If you are of opinion that he is sane now, but that he was insane on the 16th April last—insane in the sense of not being responsible—you will find that he is not guilty by reason of the insanity which was on him at the time. If you are of opinion that he was not insane at the time, and not insane now, your verdict in that case will simply be a verdict of guilty.

The jury having retired, returned a verdict of guilty, with a recommendation to mercy on account of the low mental organization of the prisoner ; in respect of which verdict the prisoner was sentenced to death.

Present,

THE LORD JUSTICE-GENERAL,

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LORDS COWAN AND DEAS.

HER MAJESTY'S ADVOCATE—*Sol.-Gen. Young—Crichton A.D.*

AGAINST

THOMAS ARNOT.—*J. G. Smith—R. V. Campbell.*

INSANITY—PLEA IN BAR OF TRIAL.—Circumstances in which a plea of Insanity in bar of trial was held to be established by the evidence.

THOMAS ARNOT was charged with the crime of Murder :—

IN SO FAR AS, on the 15th day of March 1864, or on one or other of the days of that month, or of February immediately preceding, or of April immediately following, on or near the turnpike road leading from Alloa to Stirling, and at a part thereof situated from 300 to 400 yards, or thereabouts, to the westward of the bridge over the river Devon, called Tullibody Bridge, you the said Thomas Arnot did, wickedly and feloniously, attack and assault the now deceased David Paton, farm-servant, then or lately residing with George Henderson, farmer, at or near Haugh of Blackgrange, in the parish of Logie, and shire of Clackmannan, and did with a shovel or spade, or with some other weapon to the prosecutor unknown, strike him several or one or more severe blows on or about the head or shoulders, and other parts of his person, and did otherwise maltreat and abuse him; by all which, or part thereof, the said David Paton was mortally injured, and died on or about the 16th day of March 1864, and was thus murdered by you the said Thomas Arnot.

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A minute was given in for the panel, stating that he was not a fit object for trial, being insane, and unable to give instructions for his defence.

The following witnesses were then examined :—

JOHN GREGORY WALLACE, *writer, Alloa*.—I was consulted by the prisoner's wife as to his defence about the end of April last. The following day I saw the prisoner Arnot. I told him my name. He said he had heard of me before. I told him the object of my visit, saying that I had seen his wife the day previous, and she had wished me to

No. 107. see him as to the charge against him. I explained to him the nature
 Thomas of the charge. He said that if I was to act for him as agent I must
 Arnot. take steps to bring in the Free Church and the Government for trial
 High Court. along with him. I told him that this could not be done. He said
 June 6. that he was not the responsible person, but that the Free Church was,
 1864. because he had been persecuted by them beyond what any man could
 Murder. bear for the last eighteen years, that they had published articles during
 that period against him in the Alloa newspapers, and, indeed, in all
 newspapers. They had concealed his name, but he knew quite well
 that he was meant. He instanced the Cardross case, and said that he
 was M'Millan. I understood him to mean that the Free Church put
 in Mr. M'Millan's name, but he was the party meant. He said that
 Mr. Goldie of Tullibody was his minister, and that he had preached
 against him for a number of years. On one occasion Mr. Goldie made
 reference to a man with a blue coat and a brown bible—that though
 there might be other men with brown bibles he was the only man in
 the church with a blue coat, and Mr. Goldie had meant him. He said
 that Mr. Mowbray, distiller, Cambus, was at the bottom of the
 conspiracy against him—that he influenced Mr. Goldie to preach
 against him. I asked him what was the object of all this. He said
 that the Free Church wished to excommunicate him, and if they suc-
 ceeded in doing so the Government would then lay hold of him and
 transport him to the Channel Islands, where he would have to choose
 between the whites and the blacks, and that as he had been so long per-
 secuted by the Christians here he would be obliged to join the blacks,
 which was all the Government wanted. I asked him what all this
 had to do with the case. He said that he had been so long persecuted
 by the church that he wanted to bring the church to its trial, and must
 therefore strike a blow at one of its instruments, and the boy was one.
 He said that the Free Church had used its influence with the Govern-
 ment for the purpose of bringing in the millenium. He said that that
 would never do, although it might take place soon. I was with the
 prisoner about three-quarters of an hour. The conversation was very
 unconnected. He seemed to be quite serious. I called for Dr.
 Brotherston, and requested him to visit the prisoner, and report as to
 the state of his mind. I saw the prisoner again ten days after. I
 put some questions to him about the witnesses, and could scarcely get
 any answer from him. I saw him again on the 26th May, and could
 get no information from him then. He just went over what he told
 me on the first occasion. On none of these occasions did the prisoner
 express any regret. I do not think he was able to give instructions
 for his defence.

Cross-examined.—I had no idea that the prisoner was feigning.
 He seemed in very good spirits, and said he was very comfortable.
 The second time I saw him the prisoner was engaged at his dinner.
 He took from a little box in his cell the indictment, and gave it to me,

and then resumed his dinner, and made no answer to the questions I put to him. On 26th May the prisoner was in much the same state as on the 10th. He would hardly speak, but when I pressed him, he gave much the same account as at the first.

REV. WILLIAM GOLDIE, *Minister of the Free Church at Tullibody.*
The prisoner had been a member of my congregation previous to 1857 when I became minister, but I don't think he communicated after that. On the afternoon of Tuesday, 15th March, the prisoner's daughter came to me in my house, and said that her father had come home in great distress, saying that he had killed a boy. I said to her not to believe her father till the statement was confirmed, as he laboured under peculiar fancies. I knew he did so. My first idea of this was caused by what occurred at my communion in June 1860. Each member when he applies for a token writes his name on a slip of paper, which he hands in. The prisoner waited till all the other applicants had left, and then handed in a paper with his name, and under it these words,—‘If any one have a charge to bring against me, I am here to answer for myself.’ I asked him what charge. He said I knew all about it. I stated that there was no charge that ever I knew of. He said that I had been preaching against him, and that I had been preaching heresy. I said that was a matter for the presbytery, and not for the kirk-session. He left without receiving a token. I can't say whether he was offered one. My recollection is not distinct, except that he didn't get a token, and that the impression he was labouring under was entirely without foundation. Shortly after this—a few weeks probably—I had an interview with him on the Stirling road. He was working as a surfaceman. He stated that I was acting under Mr. Mowbray of Cambus, and had been paid by him to preach against him. I met him again on the Stirling road. Prisoner was eating his dinner on the opposite side of the road from that on which I was. He crossed the road and came in before me, having in his hand a clasped knife open, with which he was cutting bread. On the other arm he had a bottle of milk. He had a peculiar startled look. I felt in danger. He said that if I as a Christian minister would give him my word that I wasn't acting under Mr. Mowbray's instructions, he would believe. I tried to turn the matter off by using the proverbial expression—the man's head's in a creel, saying that Mr. Mowbray was the last person in the world to give any such instructions, and that I was about the last man to receive them from any one. I told him there was no charge against him whatever, and that if he attended church I knew no reason why he shouldn't receive a token at our next communion. He said nothing to that, but left me. He attended the church for some Sabbaths after this, and, what was not very common for persons in his position, came to a prayer-meeting on Wednesday evening. I spoke to him at the close, and shook hands with him. After attending for a few Sabbaths, he disappeared from the church

No. 107.
Thomas
Arnot.

High Court
June 6.
1864.

Murder.

No. 107. again. I saw him after this, on the Stirling road occasionally, though
 Thomas I rather avoided that road, being afraid of him. He had a very pe-
 Arnot. culiar appearance, which I cannot well describe. I sometimes thought
 High Court. he looked like two men—the one face behind the other. The one face
 June 6. had a look of injury, and the other of being superior to all his enemies.
 1864.
 Murder. On 15th March I went to the prisoner's house, having first made in-
 quiry as to the truth of the report. I found his wife and daughter in
 great distress. I said that the general impression was that the boy
 had been injured by a cartwheel going over him. This was in presence
 of the prisoner. He said, 'Who told you that?' I said I had gathered
 it from information in the district. He said, 'Some person has done
 'it, and you don't know the party.' I said it didn't matter as to that
 —I was only stating the general impression. He then drew himself
 up and said, 'Well, sir, whoever told you that told you a lie; for I
 'did it.' I said, 'Well Thomas, aren't you sorry?' He said most
 emphatically, 'Not a bit for the deed—I'm sorry for my wife and
 'family.' He added, 'Them that have got the spirit may take the body
 'also.' He told me that the boy had been sent, and that this matter
 had been going on for twenty years, as I very well knew; that the
 provocation he had received during all that time was such that no man
 could bear it. He said that the boy wasn't to blame, and that he had
 no ill-will to the boy. I saw him next day in his own house. He
 again stated that the boy had been sent by other parties; that they
 should have employed some person of greater mental capacity to do
 their work. He began to speak very incoherently about mental force
 and manual labour force in connection with the reformation of the world;
 but that *they* could not accomplish it in that way, as the time wasn't
 yet come. He said that he was a poor man; that he had never learnt
 a lesson of grammar in his life; and it seemed very strange that there
 should be such conspiracies over the whole world against him. I think
 he said that I knew the whole matter. He said, What would they
 do with him? This was in connection with the reformation of the
 world. He asked, 'If a man did a deed and confessed it, would they
 'make him insane?' I declined to say. He folded his arms across
 his breast and said, I should think not. I understood the *they* meant
 his persecutors. He seemed to have no remorse; but rather to think
 he had done something meritorious,—as if he had inflicted a severe
 blow upon his enemies unexpectedly. The prisoner was not communi-
 cative about his delusions. I understood he was a sober man. I
 never preached against him, nor about a man in a blue coat and with
 a brown bible.

ALEXANDER M'GREGOR, *rector of the academy at Tillicoultry, and*
 formerly teacher at Tullibody, and an elder in Mr. Goldie's congrega-
 tion, proved a letter to be in the handwriting of the prisoner, which he
 had received, and in which the prisoner referred to a confederation
 against him, and certain alleged proceedings of the kirk-session.

ROBERT MOWBRAY, *distiller, Cambus*. I attend the Free Church at Tullibody. I had no acquaintance with the prisoner. Only once spoke to him that I remember of. I never gave instructions to the Rev. Mr. Goldie, or to any one else, to annoy him. I never spoke of him to Mr. Goldie that I can remember.

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Murder.

ANDREW STALKER, *surfaceman*. I work on the same road as the prisoner. My section of the road adjoins that on which he was employed. I have known him for about four years. He used to complain of people persecuting him. Mr. Mowbray was one of them. He complained of the minister preaching against him, and that the persecutions followed him wherever he went. He said he had been obliged to leave home on account of these persecutions, and had gone to the west country. He said they had followed him there; that there were paragraphs in the newspapers about him when he was away, under fictitious names. He gave no reason for this. He said they wanted to make a settlement with him, but he wouldn't take double the money. I had some talk with him about the Yelverton case about four years ago when it was going on in Ireland. He asked me about it. I said it was Captain Yelverton denying his marriage. Says he, I'm Yelverton. That's the way they always do, they never mention my name. Another time we had some conversation about the Cardross case. He asked me about it, and he then said, I'm M'Millan; and that's the way they always do. The prisoner was quite serious. He seemed to believe that he was the party in both these causes. About a month before the murder, I had some conversation with him. I asked him how he was getting on with his work. He said, not very well, and that he was working away among mud and stones. I said we were all doing that, and what was much worse, we got little pay for our work. He said it was the Government did that. The Government had that in their own hands, and did what they liked with us. He said he could turn the Government with one hand, and he would make me confess that he could. He said that was a nothing, it was quite common. Instead of one there should be two, and instead of three, four, and that would break the Government. I said I believed he was quite right. He said he knew he would make me confess it. He was speaking in a serious manner. He was a sober man. I never saw him under the influence of drink. I never heard of his being persecuted by any one except from himself. I didn't think he was right in his mind.

REV. THOMAS MURRAY, *prison chaplain*, deponed to several conversations he had with prisoner after his apprehension. On 7th May I had a long conversation with him, fully an hour. I asked him if Mr. Goldie his minister had been calling for him. He answered, No, *They* wouldn't come near him; it was of no use. He explained that he meant the Free Church. I asked what were the grounds of this? He said he had been under trial for eighteen years. He had been

June 27.
1864.

Present,

THE LORD JUSTICE-GENERAL.

LORDS COWAN AND JERVISWOODE.

HER MAJESTY'S ADVOCATE.—*Gifford A.D.*—*Crichton A.D.*

AGAINST

ALEXANDER GLENNIE.—*Burnie—Keir.*

THEFT BY HOUSEBREAKING—TIME, LATITUDE OF—INDICTMENT—RELEVANCY.—Circumstances in which, in an indictment for theft by housebreaking, objections to the latitude in respect of time were repelled, the accused being a night-constable, and in that capacity having had opportunities and facilities for breaking into and entering the premises from which the goods were stolen.

2. The alternative words 'or some other way to the prosecutor unknown,' in the description of the *modus*, objected to, but sustained under the circumstances.

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Alexander
Glennie.

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1864.

Theft by
House-
breaking.

ALEXANDER GLENNIE was charged with the crime of theft, aggravated by being committed by means of housebreaking—

IN SO FAR AS, you the said Alexander Glennie having been, during the period betwixt the 1st day of November 1861 and the 30th day of December 1863, or part thereof, a night-constable in the Aberdeen Police, and having had, while on duty in said capacity, charge of the premises hereinafter libelled, and having thus had opportunities and facilities, while on duty in said capacity, of breaking into and entering said premises, and stealing property therefrom without immediate detection, you did, &c.

The ninth charge was thus set forth—

LIKEAS (9.), On various or one or more occasions betwixt the 1st day of January and the 30th day of December 1863, the particular time or times being to the prosecutor unknown, you the said Alexander Glennie did, wickedly and feloniously, break into or enter the warehouse or premises in or near Union Street, Aberdeen, then and now or lately occupied by Copestake, Moore, Crampton, and Company, lace-merchants in London, by opening a lockfast door of said ware-

house or premises by means of a false key or picklock ; and having thus, or in some other manner to the prosecutor unknown, obtained entrance to said warehouse or premises, you did, then and there, wickedly and feloniously, steal and theftuously away take [Then followed an enumeration of various articles alleged to have been stolen.]

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breaking.

The eleventh and twelfth charges were similarly libelled.

BIRNIE and KEIR objected to the relevancy of the indictment—(1.) That the prosecutor had taken too great latitude in point of time in three of the charges, viz., one year in the 9th, two years in the 11th, and two years in the 12th charges ; that no reason was stated in the indictment why a latitude so unusual was taken ; and no circumstances set forth sufficient to show that the ordinary period of three months could not have been specified in each of these charges. The statement that the prisoner as night-constable had charge of these premises, and had, in that capacity, facilities and opportunities for committing the thefts libelled without immediate detection, was not a sufficient reason, because he had not in that capacity access to the interior of the premises. He had not the charge or custody of the goods as a servant of the owner would have had, so as to enable him to conceal the thefts after they were committed. The fact that his goods had been abstracted would be as readily apparent to the owner when the theft was committed by a night-constable as in the case of theft committed by an ordinary thief or housebreaker ; and the time when the theft was committed could thus in both cases be ascertained with equal facility ;—*Robert Smith and James Wishart*, High Court, March 23, 1842, Broun, vol. i. p. 134 ; *James Thorburn Creighton*, Dumfries, Sept. 29, 1842, Broun, vol. i. p. 429 ; *Alexander Wilson*, Aberdeen, April 22, 1856, Irvine, vol. ii, p. 409. (2.) The words ‘or in some other manner to the prosecutor unknown,’ as they stood in connection with the words ‘obtained entrance,’ in all the charges were not

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admissible, in respect the prosecutor has specified only one mode of obtaining entrance by housebreaking, viz., by opening a locked door, and as he is not entitled to prove that the prisoner had entered the premises in any mode essentially different from that special mode, the words objected to, comprehending every possible mode of entrance, could not receive any legal effect, and were therefore superfluous—*John or Alexander Campbell*, referred to in *Alison*, vol. ii. p. 276 ; *John Arthur*, High Court, March 16, 1836, Swinton, vol. i. p. 124 ; *John Jerdon*, Jedburgh, May 3, 1837, Swinton, vol. i. p. 502 ; *Mary Wood*, High Court, Nov. 7, 1856, Irvine, vol. ii. p. 497 ; *Ann M'Que*, High Court, Feb. 20, 1860, Irvine, vol. iii. p. 552.

MONCRIEFF, for the prosecution, referred to a number of indictments where similar latitude had passed without objection.

LORD COWAN.—There are two objections taken to this indictment. The objection taken last that too great latitude would be open to the prosecutor in the proof of housebreaking cannot be sustained. The proof may be limited to the special kind of housebreaking set forth in the indictment, and there will be ground for argument if proof of a different kind be offered in the course of the trial.

The objection that too great latitude in point of time has been taken is attended with more difficulty. The objection was taken on Circuit in circumstances essentially different. There was then no explanation whatever of the latitude taken. The law on this point is well explained by Hume, to this effect, that when more than usual latitude in point of time is taken, circumstances must be set forth to justify the excess. The question simply is whether circumstances sufficient to justify the latitude taken have been set forth here. What does the indictment in this case set forth ? The reason is stated as applicable to the whole period of the prisoner's employment as night-constable, 'or part thereof ;' but no

objection has been taken that there may thus be no reason applicable to the whole period. We must understand from the nature of this charge that the thefts were committed in the night-time, although that is not specially mentioned. On the whole I think the statement sufficient to justify the latitude taken ; but the objection might have been obviated by a little more nicety. The statement does not satisfy us as a reason why there was not earlier detection ; and some particulars should have been set forth to account for the thefts not having been discovered. It rather appears to me that there might have been more particulars given to us. Why was it not alleged that the owners did not take stock for a length of time ? I get over the difficulty, however, from the statement made of the prisoner's capacity, and that his position gave him facilities for committing the thefts without immediate detection. What that means I cannot say ; but, I presume, that in the course of the trial no immediate detection can be established as possible. The *modus* specified is also important. The prisoner, it is alleged, went about, apparently in charge, with false keys, and effected an entrance when no one was at hand to interrupt him. He might arrange the goods in any way he thought proper. This statement gives room for latitude. I cannot think that the panel's condition is thereby made worse.

LORD JERVISWOODE.—I am of the same opinion as Lord Cowan with reference to the objection first referred to by him. With reference to the second point, whether too great latitude in point of time has been taken, I have had very considerable difficulty ; but, on consideration, I am of the same opinion with Lord Cowan on that point also. There can be no doubt that a shopman has facilities for committing theft in such a way that the owner may not detect the abstraction of his goods for a considerable time ; and the question is whether a watchman is in a similar or analogous position to a

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shopman. Looking to the whole charge and the statement that the panel was a night-constable, and had charge of the premises, and in that capacity had opportunities for committing the thefts, I am prepared to sustain the relevancy. What may occur in the course of the proof to affect the relevancy of particular charges is a different matter.

THE LORD JUSTICE-GENERAL.—I think it right to state that I go along with Lords Cowan and Jerviswoode, though I have difficulty as to one point. I have no difficulty as to the second objection, relating to the mode of housebreaking. I think the latitude taken as to that point allowable. The prosecutor will be restrained if he make an improper use of it. But as to the latitude taken in point of time I have difficulty. The law does not allow greater latitude than three months, so as to give the accused fair opportunity for defence on his trial, and if that period be exceeded, the prosecutor must justify the excessive latitude so taken. In this case the usual latitude has been exceeded in various charges. As to the case quoted in support of the indictment it is to be observed that a butler holds a very peculiar position. In the usual case, he is entrusted with the custody of the plate and other articles belonging to his department. It is alleged here that the prisoner had charge of the premises, that is of the exterior, not the interior. As a night constable he might be seen manipulating the locks, and could be supposed to be acting in the strict performance of his duty. There would be no watchman to interrupt him. My difficulty lay in regard to the immediate detection of the theft. But the prisoner would have the same facilities for remaining on the premises and arranging the goods so as to avoid immediate detection, as he had for effecting an entrance; and it will be incumbent on the prosecutor to show that there were facilities for avoiding detection, especially in reference to those charges where unusual latitude has been taken. On the whole I think the

objection not sufficient to exclude the case going to trial.

The objections were repelled, and the indictment held relevant.

The panel was convicted of Theft as libelled without the aggravation of Housebreaking.

Sentence, Eight years' penal servitude.

Present,

THE LORD JUSTICE-GENERAL,

LORDS COWAN, DEAS, ARDMILLAN, NEAVES, AND JERVISWOODE,

MARGARET YOUNG, Suspender—*Scott—Cattanach*.

AGAINST

ANDREW SCOTT, Respondent—*Fraser*.

July 4.
1864.

SUSPENSION—STATUTE 4TH GEO. IV. c. 34—MASTER AND SERVANT—
SENTENCE.—Circumstances in which a conviction under the Act
4th Geo. IV. c. 34, for desertion of service was set aside.

THIS was a suspension of a conviction and sentence
by the Justices of the Peace of the County of Roxburgh.

No. 109.
Young v.
Scott.

On the 7th June 1864, the respondent lodged with
the Justices a complaint, under the Act 4th Geo. IV.
c. 34, craving warrant for the apprehension of the
suspender, as having deserted from her service before
the expiry of the period for which it was averred that
she was engaged as a bondager or worker on the re-
spondent's farm.

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Suspension.

In her oath before the Justices the respondent de-
poned—

That Margaret Young contracted by or through her sister, Janet Young, now or lately residing at Sinton Downs, in the parish of Sinton, and county of Roxburgh, with William Jack, steward to him the said Andrew Scott, and residing at Frogden, to serve him, the complainer, for one year and a half, from the 22d day of November eighteen hundred and sixty-three, as a bondager or worker on the said farm of Frogden, at the rate of one shilling per day for the winter months, or to the twenty-sixth day of May eighteen hundred and

No. 109. sixty-four, with free carriage of coals from the Kelso or Maxwellhaugh
 Young v. Station of the North British Railway; and at one shilling per day during
 Scott. the winter months, with coals at hill price, or at the price the same
 High Court. could be purchased at the coal-pit, with twelve hundred yards of
 July 4. potatoe ground, and harvest wages during harvest, and during the
 1864. winter of eighteen hundred and sixty-four and eighteen hundred and
 Suspension. sixty-five, wages at the rate of tenpence per-day, with coals at the
 hill price, together with a free house from the commencement to the
 end of said agreement. That the said Margaret Young entered to
 her charge in virtue of the said agreement upon the twenty-second
 day of November eighteen hundred and sixty-three, and continued
 therein till Thursday the twenty-sixth day of May eighteen hundred
 and sixty-four, when she deserted from her service before the said con-
 tract was completed, &c.

The Justices granted the warrant as craved, and the suspender was imprisoned under it, on the 8th June 1864, and taken before the Justices of the Peace at Kelso. The cause was adjourned till the 13th June, when, after some further evidence, the following deliverance was pronounced :—

KELSO, 13th June 1864.—Whereas the said Margaret Young complained of hath not cleared herself of the said complaint by Andrew Scott, tenant of Frogden, but, on the contrary, the said Andrew Scott hath fully proved his complaint, therefore grants warrant to imprison the person of the said Margaret Young in the jail of Jedburgh, there to remain and to be held to hard labour for the period of six weeks from the date hereof.

(Signed) JAS. STORMONT DARLING, J.P.
 JNO. MURRAY, J.P.

It appeared that in the course of the proceedings, and before this judgment was pronounced, the agent for the respondent had, by an indorsation on the back of the complaint, restricted the alleged period of service to twelve months.

The present suspension having been brought, it was pleaded, *inter alia*, that even on the evidence of the respondent there was no binding agreement, or at least no binding agreement for a longer period than six months.

SCOTT and CATTANACH, for the suspender, argued—The alleged agreement was not in writing, so that it was impossible it could, in any circumstances be held binding

for eighteen months; and as eighteen months was the time in contemplation between the parties, if it was not binding for that time it was not binding for any period whatever. Further, no *rei interventus* had taken place on the alleged contract for eighteen months by virtue of Young's service for six months, as that service was referable to the usual service as a farm servant, and was not under the agreement.

No. 109-
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At advising—

LORD COWAN said, the first point which presented itself in the case was the legality of the contract as binding the servant to service for eighteen months. He was inclined to think that this verbal contract was one which could not be enforced by the law of the country. Whether it might be good for twelve months was a separate question; but if they were driven to decide that point, he confessed that his present impression was that, having been arranged for eighteen months, with varying wages for the three successive periods of six months, it was not binding for twelve months. But it was not necessary to decide that question in this case. They had a complaint presented to the magistrate upon oath, setting forth this contract, which he held to be an illegal contract, for eighteen months; and having the woman apprehended and put upon her trial for desertion of service, they had the master actually endorsing upon the back of the complaint that he held the contract as being only for twelve months. Now, the magistrate proceeded, in the face of this statement, to find that the original contract for eighteen months' service was binding, and that she had deserted her service in violation of that contract. He thought under the circumstances they had no alternative but to set aside the conviction.

LORD DEAS.—The only difficulty I have in thinking that the Court below came to a right result arises from the grounds upon which it has been thought necessary to defend the procedure. The view taken at the bar is

No. 109. that the agreement of parties was for a service not of
Young v. eighteen months but of twelve months only, and that
Scott.
High Court. the prosecutor corrected, and was entitled to correct, the
July 4.
1864. mistake he had made in this respect, by explaining that,
Suspension. in point of fact, the agreement was only for twelve
months. If I could take that view of the minute of
restriction I should think it incompetent. The contract
set forth in the complaint was a verbal contract of
service for eighteen months, and that complaint could
not be supported by proving a contract for twelve
months. But I have no doubt that the meaning of this
minute was, that although the contract was made for
eighteen months, and was proved to have been for
eighteen months, the prosecutor had come to be satisfied
that it was not legally binding for more than twelve
months, and so restricted its legal efficacy to that period.
If the desertion had taken place in the course of the
last six months of the service, the effect of this omission
would of course have been fatal. But as it took place
within the first twelve months, it was equally a breach
of contract whether the contract was for twelve or
for eighteen months. I have no doubt that in the
general case, a verbal contract for eighteen months,
where the service has been entered upon, is good for a
year. If indeed it could have been shewn that there
was such a difference in the conditions applicable to the
last six months,—as, for instance, that the wages were
to be much higher,—as to make it inequitable to en-
force against the servant the eighteen months' verbal
contract for twelve months, that might have made an
exception. But there was no such specialty in this case.
The remuneration which the servant was to get during
the latter period of service was lower than those during
the first part. Taking then the verbal contract for
eighteen months to have been good for a year, I am of
opinion that the whole proceedings before the justices
were regular and competent, and that the conviction
ought to be sustained.

LORD ARDMILLAN concurred in the opinion of Lord Cowan. With reference to the terms of the conviction he said—A conviction in general terms, where the charge was alternative, had often been held to be fatal, because it did not meet one or other of the two alternatives, and therefore it was void. No prosecutor would be allowed to restrict a charge whereby he injured the prisoner's right. He would not be allowed to get rid of his difficulty by restricting his charge. He must only restrict it in order to give some benefit to the prisoner. He held that the restriction interposed in this case was truly for the benefit of the prosecutor. Therefore, he thought the judgment ought to be quashed.

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Young v.
Scott.

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1864.
Suspension.

LORD NEAVES said he was of the opinion of the majority of their Lordships who had spoken.

LORD JERVISWOODE also concurred in the opinion of Lord Cowan.

The LORD JUSTICE-GENERAL concurred in the view of the majority, remarking that he did not think the prosecutor could change the character of his case at the end of the proof against the accused.

The conviction was accordingly set aside.

D. F. BRIDGEFORD, S.S.C.—MURRAY & BEITH, W.S.—Agents.

Present,

July 9.
1864.

THE LORD JUSTICE-GENERAL,

LORDS COWAN, DEAR, ARDMILLAN, NEAVES, AND JERVISWOODE,

WILLIAM BLAIR, Appellant—*Scott*.

AGAINST

DAVID MITCHELL AND JOSEPH MALLOCH, Respondents—*Balfour*.

APPEAL—JURISDICTION—COMPETENCY—SALMON FISHERIES (SCOTLAND) ACT 1862, AND 26TH VICT. C. 97—EVIDENCE ACT, 16TH VICT. C. 20—EVIDENCE—WITNESS.—A prosecution for contravention of the Salmon Fisheries Act 1862, is a criminal proceeding,
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and therefore the person accused is not a competent witness for himself.

2. A Sheriff found a complaint under the Salmon Fisheries Act 'not proved.' The prosecutor appealed to the Circuit Court of Justiciary, asking that the judgment of the Sheriff should be recalled, on the ground that certain evidence had been improperly admitted at the trial. The case having been certified to the High Court, the appeal was sustained as competent.

No. 110.
Blair v.
Mitchell.
High Court.
July 9.
1864.
Appeal.

THE complainer, Clerk of the Tay Fishery Board, prosecuted the respondents, David Mitchell and Joseph Malloch, for taking salmon during the annual close time by means other than rod and line, in contravention of the 14th section of 'the Salmon Fisheries (Scotland) Act 1862.' The case was tried on 8th January 1864, before the Sheriff-substitute (Barclay) of Perthshire. The respondents pleaded not guilty, and evidence was led. After the complainer's proof was concluded, the respondents offered themselves as witnesses on their own behalf. The complainer objected to their evidence being received, but the Sheriff repelled the objection, 'in respect the cause is one *quasi* civil.' The respondents and three other witnesses were then examined for the defence. The Sheriff found the complaint 'not proved,' and therefore dismissed the same.

Against this judgment the complainer appealed to the Circuit Court of Justiciary, praying 'that the evidence of the respondents should be rejected as incompetent, and that the evidence led by the appellant as prosecutor, should be sustained as proving the complaint, or heard *de novo*, and that the judgment or decree of the said Sheriff-substitute appealed from be recalled and altered, and that the defenders in said complaint be convicted of said offence against the said Act, and sentenced to pay and deliver over to the appellant the penalties and forfeitures imposed thereby, with expenses.'

At Perth Circuit (7th May 1864), the respondents objected that the appeal was incompetent, in respect

the judgment appealed from was one of acquittal. After hearing counsel, Lords Cowan and Jerviswoode repelled the objection to competency, and in respect of the general importance of the question raised on the merits of the appeal, certified the case to the High Court.

No. 110.
Blair v.
Mitchell.
High Court.
July 9.
1864.
Appeal.

The case came on for discussion on 4th July 1864.

SCOTT for the appellant argued—

The question is, whether this is ‘a criminal proceeding,’ in the sense of the Evidence Act (16th Vict. c. 20, sect. 3). If it is, the respondents were incompetent witnesses for themselves. The offence charged was taking salmon during the annual close time. No doubt that is not a *malum in se*, but it clearly falls under Hume’s definition of a crime, as a ‘trespass in respect of one of those ‘articles of wise economy, which affect the public welfare, and are matters of general concernment.’ Apart from general considerations, the question can no longer be considered as an open one. The case of *Bruce v. Linton*, 16th December 1861, is an authoritative decision on the point. In that case it was held by the whole Court, after a full argument, that proceedings similar to those under the present Act, 25th and 26th Vict. c. 69, were truly of a criminal nature. In the previous case of *Scott v. Stevenson*, Jedburgh, Sept. 8, 1854, Irvine, vol. i. p. 603, a similar decision was given by Lord Ivory, in reference to the Tweed Fishery Act (11th Geo. IV. c. 54).

BALFOUR for the respondents.—The cases founded on are inapplicable. They occurred under Statutes differing in many essential particulars from the present. The question as to the character of proceedings under the Salmon Fisheries Act of 1862 is now raised for the first time, and can only be decided by a careful examination of the Statute itself. Such an examination is favourable to the respondents. 1. The general design of the Statute is to protect private property, not to defend any public interest. This is shown by the way in which penalties recovered under the Act are directed to be applied (sect.

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32), viz., in defraying expenses, which would otherwise fall upon the proprietors of fishings. 2. The acts declared to be offences in the Statute are not *mala in se*. Many of them do not even presume guilty knowledge, and it would be absurd to regard them in the light of crimes. 3. Under section 25, district boards have power to make bye-laws, the breach of which is to be dealt with as an 'offence.' It can hardly be contended that these offences are criminal, and yet the Statute makes no distinction between them and the other prohibited acts. 4. The prosecution under the Act is at the instance of a clerk of the district board, and the concurrence of the fiscal is not required, as in ordinary cases. 5. The person complained against may be found 'liable in expenses, for which 'decree' may be pronounced (sect. 30); forms applicable only to civil causes. 6. There are two alternative modes of recovering penalties under the Act. In the present case the proceedings were those authorized by the 27th section. The penalties under that section are pecuniary merely; and if they be paid, no imprisonment follows, for the only imprisonment authorized is to enforce payment of the penalty; and when the money is paid, there is an end of the imprisonment. But the complainer might also have proceeded 'by ordinary action, or in the Small Debt Court of the 'Sheriff,' (sect. 31). In that case the accused would have been a competent witness, and it would be strange if a complainer had the power, by an arbitrary choice of *forum*, to determine the nature of the evidence on which a case should be decided. 7. Generally the language used in the Statute is more appropriate to civil than to criminal proceedings. But there is a remarkable exception in the 27th section. There certain offences are plainly dealt with as criminal. The conclusion is irresistible that offences under other sections of the Statute have not that character. 8. A party imprisoned for a penalty incurred under the Salmon Fisheries Act is entitled to the Act of Grace. This shows that the

penalty is truly a civil debt.—*Robertson v. Collins*, No. 110. Blair v. Mitchell. Court of Session, Feb. 16. 1837, D. B. M. 9. It would appear from the case of *Paul v. Barclay and Curle*, High Court, Nov. 24, 1856, Irvine, vol. ii. p. 537, that the prosecutor may competently be examined for the defence in prosecutions under the Master and Servant Act. There is a striking analogy between that Statute and the present.

‘The Court took the case to avizandum. Before it was put out for advising, a minute was lodged for the appellant, stating, that in the event of their Lordships holding that the evidence of the respondents was inadmissible, and recalling the interlocutor of the Sheriff dated 8th January 1864, he did not intend to proceed further in the cause.’

At advising of this date—

LORD COWAN.—The only question which I feel called upon to consider in this is, whether it was competent to adduce the accused as witnesses in the trial. The decision of that question will, in my opinion, affect not merely prosecutions under the Salmon Fisheries Act, but prosecutions under many similar Statutes. Feeling its great importance, I have given it all attention, and have come to be of opinion that the Sheriff erred in admitting the evidence of the accused.

By the Evidence Act of 1853,—prior to which parties to civil causes were neither admissible nor compellable to give evidence for or against themselves,—it is enacted that it shall be competent to adduce and examine such parties as witnesses, but with this proviso, that the Act shall not apply to any party ‘who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable by summary conviction.’ The present prosecution was for an offence under the Salmon Fisheries Act, one of the objects of which is ‘the prevention of illegal fishing.’ It was for one of the acts declared to be offences by the 11th clause of the Act that this proceeding was instituted ;

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and the 28th clause of the Act provides that all offences under the Act may be prosecuted for, and the penalties recovered, before any Sheriff or any two Justices, in a summary form. Having regard to the nature of the prosecution, I hold it to be a criminal one. I apprehend that any proceedings taken to enforce penalties for acts that are illegal, or to deter others from doing the like acts, satisfy the character of criminal procedure. This was not a proceeding to recover damages, but penalties imposed on the parties found guilty of what the Statute declares to be an offence. Nor can it be disputed that the proceedings were for an offence punishable by summary conviction. The parties were called on to plead, and had they pleaded guilty, conviction must have instantly followed,—a circumstance which of itself is enough to impress on this proceeding the character of criminal. I think the case of *Scott v. Stevenson* is an authority in point. In that case Lord Ivory stated six tests of a prosecution being a criminal one, all of which but one are satisfied in the present case,—the exception being that this prosecution was not at the instance of the public prosecutor. But I have not heard it said that the mere circumstance of the procurator-fiscal being the prosecutor necessarily fixes a character on the proceeding which it would not otherwise have. No doubt it may aid the argument that the proceeding is at the instance of the public prosecutor, but the absence of his instance or concurrence cannot affect the character of the proceeding, if otherwise it is clearly shown to be criminal in its nature and essence. I also think that the case of *Linton against Bruce* supports the view I have expressed.

On the whole case I am of opinion that the verdict of acquittal should be set aside, and I see no difficulty in point of form in arriving at that result. A minute has been lodged, to the effect that in the event of our holding that the evidence was inadmissible, and recalling the interlocutor of the Sheriff substitute allowing it,

the prosecutor does not intend to proceed further in the cause. The minute gets rid of any difficulty that might have arisen in the event of the proceedings being resumed, and renders it unnecessary for the Court to do more than simply to decide the question whether, in such cases as the present, the evidence of the accused persons is admissible. I think it is not, and therefore am of opinion that we may competently recall the interlocutor of the Sheriff-substitute.

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LORD DEAS.—If I thought that the question were competently before us, I should have great difficulty in making up my mind whether this was to be regarded as a civil or a criminal proceeding. For the more attentively I read the Statute, the more I find in it things difficult to reconcile, if not altogether inconsistent with each other. Of one thing I am very clear, that the question whether this is to be held a civil or a criminal proceeding cannot be determined by any abstract definition of a criminal. It has been suggested that everything is a criminal offence which is made punishable by Statute, with a view to deter others from committing the like offence. I cannot concur in that view. It would make criminal all those innumerable acts which are declared, in police statutes, local and general, to be offences subjecting parties to penalties. Many of these acts do not even require to be committed by the party who is held to be the offender, and against whom the complaint is directed. A servant may throw out ashes, or allow a chimney to go on fire, or do innumerable other prohibited things, not only without the master's knowledge, but much to his displeasure, and yet the master will fall to be dealt with as the offender, and subjected in the penalty. The question, what is to be held civil or criminal, under any particular Statute, can only be solved by looking carefully at the words of the Statute itself, and considering what the Legislature really intended. When I come to do that with this Statute, I find the question very perplexing. There are many things prohibited in the

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Statute which it is difficult to suppose the Legislature could have intended to make criminal offences. Take, for instance, the having in one's possession 'foul or unseasonable salmon.' It is not necessary to constitute this offence that there should be any guilty knowledge on the part of the individual. It may be his misfortune and not his fault that his fishmonger or his servants have allowed foul salmon to be used at his table. Nevertheless, he may be subjected in the penalty. But is he to be branded as guilty of a crime or criminal offence? I am not prepared to come to that conclusion. At the same time I admit that there is such perplexity in regard to the forms of procedure directed by the Act, as to make it almost impossible to form a satisfactory opinion, whether the proceedings are meant to be civil or criminal.

But I feel myself relieved from the necessity of forming an opinion upon that matter, because I think in any view, this suspension falls to be refused. If the proceeding was civil what the Sheriff did was right, even supposing this to be the proper Court of review. If, on the other hand, the proceeding was criminal, then, I think, the judgment is final. These parties were brought before the Sheriff, and they pleaded not guilty. Witnesses were examined, including the accused parties themselves, and the Sheriff found the complaint not proven. Now the Statute provides that there shall be a record only 'of the charge and of the judgment pronounced thereon;' and we cannot tell whether the Sheriff was or was not influenced by the evidence of the parties themselves. It may be, that he gave no weight to that evidence at all, and we are not entitled to conclude that he came to the result of finding the offence not proved, in respect of what these parties stated. I am not by any means satisfied that, when the Sheriff has acquitted, the fact of the prosecutor alleging that some incompetent evidence was admitted in the course of the trial is a ground for setting aside the verdict of

acquittal, which in itself is final under the Statute. I do not know any precedent or practice for that, and it would be startling to adopt it now. Neither do I think that the matter has been at all mended by the prosecutor putting in a minute in this Court, agreeing not to try the respondents over again. Any person, brimful of patriotism and public spirit, or it may be of personal dislike, may institute a new complaint against these men. Unless we are entitled to put matters in such a position that a new trial may take place, I do not think that we can be entitled to interfere at all with the judgment pronounced. But I take it to be matter of constitutional law, that when a man has been once tried, he is not to be tried again for the same offence. If we decide this case in the way proposed, where is it to end? In all such summary trials resulting in an acquittal, is the party to be liable to be tried again, because we take a different view from what the Sheriff did of the admissibility of some portion of the evidence? Whether it be the admissibility of a witness or the admissibility of a question does not seem, in principle, to make any difference. With all deference, I cannot go into that view. We have no right to go beyond the statutory record before us, and no means of ascertaining, if we did, whether the Sheriff, in acquitting, was or was not influenced by evidence which we may think ought to have been excluded. The more we regard the complaint as one of a criminal nature, the less presumption is there in favour of the prosecutor, whatever presumption there might have been in favour of the accused. In short, I think that we are not called upon to say whether the procedure was civil or criminal in the sense of the Evidence Act, because, even assuming it to be criminal, the judgment of acquittal is final; and if it was civil, there is, of course, no room for the objection, so that, in either view, our judgment would be to refuse the suspension.

LORD ARDMILLAN.—I do not share in the difficulty felt by Lord Deas. This Statute gives the power of appeal

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to both parties, and we have in former cases set aside judgments from inferior courts on the ground of evidence having been improperly admitted, even though there was no provision for a record of the evidence. On the question more immediately before us, it appears to me that unless some clear distinction can be made between this case and that of *Bruce v. Linton*, the point as to the proceeding being a criminal one must be held as settled. I am of opinion that the principles laid down in the case of *Linton* are clearly applicable to the present case. I hold that this was a criminal proceeding for an offence punishable on summary conviction, and on that ground I am of opinion that the evidence of the accused was inadmissible, and that the verdict ought to be set aside. I consider this case as of the utmost importance, because it is contrary to the most settled and most sacred principles of our law that a prosecutor should have the power to put on oath and examine against himself a party whom he accuses of an offence.

LORD NEAVES.—I am of the same opinion as the majority of your Lordships. I think that the precedents which have been cited show that this was a criminal proceeding, and that the same thing is also shown by the general character of the proceeding. The object of the Statute in prohibiting illegal fishing is of the greatest public benefit, and of the greatest moment to the commerce and food of the country, and the violation of any of its provisions is a crime in its nature. I am therefore clearly of opinion that the evidence of the accused parties was inadmissible, and that the judgment ought therefore to be set aside.

The LORD JUSTICE-GENERAL.—I think it perfectly clear that this was 'a criminal proceeding' in which the parties were 'charged with an offence punishable on 'summary conviction.' I therefore think that the evidence of the accused was inadmissible. I have had more difficulty on a point which was not argued, and my difficulty is very deep. It goes to this, whether a

judgment of acquittal can be the subject of appeal at all ? The prosecutor can appeal against an award of penalties which he thinks have been mitigated to an extent that was not competent, but I have a difficulty on the question, whether an appeal against an acquittal is competent ? Seeing, however, that a prosecutor has a right of appeal against a judgment that does not award sufficient penalties, surely he ought not to be deprived of the right of appeal against the admissibility of evidence, merely because the evidence has resulted in an acquittal.

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The following interlocutor was pronounced :—

‘ Sustain the appeal : Find it was incompetent to receive the evidence of the respondents as witnesses in the cause : Therefore recall the interlocutor which allowed the respondents to be adduced, as also the judgment finding the complaint not proven, and ordain the depositions of the respondents to be withdrawn from the proceedings : But in respect of the minute given in for the appellant stating that he did not intend to proceed further in the cause, find it unnecessary to remit the cause back to the Sheriff with reference to that portion of the proof which has been objected to, or to pronounce any further deliverance otherwise on the merits of this appeal : Find no expenses due to either party, and decern,’ etc.

MACKENZIE & DICKSON, Writers, Perth.—JOHN GALLETT, S.S.C.—Agents.

NORTH CIRCUIT.

Sept. 28.
1864.

Autumn 1864.

PERTH.

Judges—THE LORD JUSTICE-CLERK AND LORD NEAVES.

HER MAJESTY'S ADVOCATE—*Crichton A.D.—F. Deas,*

AGAINST

CHARLES CROCKET AND CAUTIONER—*J. C. Smith.*

CITATION—DOMICILE—FORFEITURE OF BAIL-BOND—*Held*, on a motion for forfeiture of a bail-bond, that citation of the accused at a conventional domicile specified in the bail-bond was sufficient, although the cautioner, who opposed the motion, alleged and offered to prove that at the date of the citation, and for more than forty days prior thereto, the accused was resident furth of Scotland.

No. 111.
Charles
Crocket.

Perth.
Sept. 28.
1864.

Fraudulent
Conceal-
ment of
Effects, &c.

CHARLES CROCKET, designed as 'now or lately grocer
' or provision merchant in Dundee, and now or lately
'residing in or near Union Street, Dundee,' was charged
with fraudulent concealment of his effects on the eve of
bankruptcy; but failed to appear.

The Advocate-Depute moved for sentence of fugita-
tion, and forfeiture of the bail-bond.

The bail-bond (which was produced) was in these
terms:—

I, John Skinner, writer in Dundee, do hereby enact, bind, and oblige myself, my heirs, executors, and successors, as cautioner and surety, acted in the Sheriff-Court books of Forfar, for Charles Crocket, presently a prisoner in the prison of Dundee, that I shall present the person of the said Charles Crocket at any time and place at which he shall be lawfully summoned. . . . And I, the said Charles Crocket do hereby consent and agree, and bind and oblige myself, to hold the Sheriff-Clerk's office in Dundee as a domicile whereat I may be cited. . . . declaring that citations and intimations left for me at the said office shall have the same effect, to all intents and purposes, as if made or delivered to myself personally, etc.

The accused had been cited at three different places, viz., (1.) at the last known residence in Dundee, (2) at the market cross of Forfar, and (3.) at the Sheriff Clerk's office in Dundee.

No. 111.
Charles
Crocket.

Perth.
Sept. 23.
1864.

Fraudulent
Conceal-
ment of
Effects, &c.

CAMPBELL SMITH, for the cautioner, opposed the motion for forfeiture of the bail-bond, on the ground that the accused had not been duly cited to appear. In support of this objection, he alleged and offered to prove that, for more than forty days, and indeed for several months, prior to the date of the citations, the accused was furth of Scotland, and had no domicile therein. In these circumstances (it was contended) the only way he could be lawfully cited, was edictally at the market cross of Edinburgh and pier and shore of Leith. No such citation, however, had been given. The citation at the Sheriff Clerk's office could only be supported on the supposition that the consent obtained in the bail-bond was valid and effectual. But it was a recognised principle in criminal law, that no mere consent by an accused party could warrant the prosecutor in omitting any legal formality. If it was intended to dispense with any particular kind of citation, that should have been made express matter of stipulation in the bail-bond—Hume, vol. ii. p. 259; *Robert Lacy*, Perth, April 13, 1837, Swinton, vol. i. p. 493; *John Laird*, High Court, Feb. 19, 1838, Swinton, vol. ii. p. 26.

CRICHTON, for the prosecution, while he maintained that all the citations were valid, relied mainly on that given at the Sheriff-clerk's office, as the domicile fixed by the bail-bond, to which the cautioner was a party—*William Ward*, Jedburgh, April 24, 1821, Shaw, p. 60.

LORD NEAVES.—This objection has been very naturally brought before us, and the grounds upon which it has been supported have been well and ably stated by the counsel for the cautioner who objects to the forfeiture of the bail-bond. But I am of opinion that the objection is not well founded, in so far as regards the execution

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of citation against this panel at his conventional domicile. It is not necessary to express an opinion with regard to the other citations, but the inclination of my mind is, that, if it had been true, as has been alleged, that this party had ceased to live or be in Scotland for months before the actual citation—that he had no domicile kept up by residence of servants, or wife, or children within this country—that he was not a person wandering about, and lurking here and there so as to have merely a vague domicile—then the citations at the market cross and at his last known residence were not good. But for the contents of this bail-bond the proper citation of the party was by edictal citation. But then the question comes to be, whether that mode of citation is not superseded or rendered unnecessary by service at this conventional place of citation fixed in the bail-bond. I am well aware that, in criminal matters, no mere consent of a party to dispense with the law will dispense with it; the consent of a party in a private writing between an accused person and the prosecutor, saying, ‘I will consent to be summoned so and so,’ will not make that a good citation; but the bail-bond that we have here is not a mere private instrument; it is a bond of a judicial description, under which this party, having been put under charge for a crime, and committed upon that charge until liberated in due course of law, and bail being then offered and taken, this bail-bond is granted, embodying a judicial arrangement of a reasonable nature, by which the accused, while obtaining his liberty, agrees to be cited at a conventional and convenient domicile, the Sheriff Clerk’s office, with a view to a trial of his case. I think the law has always recognised that such a stipulation so made is a fair and judicious arrangement; and that being the case, the execution at this conventional domicile is covered by the ordinary warrant in the diligence that is issued upon the indictment laid against the accused, authorising that he shall be lawfully summoned. This being a

legal means of summoning stipulated judicially in the bond, and the cautioner being a party to that, it seems to me to be valid and binding. What the cautioner does is to bind himself to present the accused when legally cited; what the law says is, that under this arrangement for admitting the accused to bail, this hold will be kept over him, and on his being legally cited at the place fixed in the bond, the cautioner is bound under the terms of the bond.

The LORD JUSTICE-CLERK.—I am entirely of the same opinion, and on the same grounds.

The Court pronounced sentence of fugitation against the accused, and declared the bail-bond to be forfeited, repelling the objection stated for the cautioner.

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Charles
Crocket.

Perth.
Sept. 28.
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ment of
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Present,

THE LORD JUSTICE-GENERAL.

LORDS DEAS AND ARDMILLAN.

MICHAEL HINCHY, Petitioner—*J. C. Smith.*

HER MAJESTY'S ADVOCATE, Respondent—*Gifford A.D.*

PETITION—FUGITATION AND OUTLAWRY—REPOING.—Circumstances in which a petition for reponing against a sentence of Fugitation was granted *simpliciter*, notwithstanding the opposition of the Public Prosecutor.

THIS was a petition for recal of a sentence of outlawry pronounced against the petitioner at the Perth Circuit Court, on the 5th May 1864, on a charge of fabricating false accounts.

No. 112.
Michael
Hinchy.

High Court.
July 18 and
20, 1864.

Petition.

The petition, after narrating the terms of the indictment, set forth, that the petitioner failed to appear to answer to the charge, having been taken ill in Edinburgh on his way to Perth, and that sentence of outlawry was in consequence pronounced against him. That

No. 112. he was shortly thereafter apprehended on a petition at
 Michael the instance of the Lord-Advocate, and was imprisoned
 Hinchy. in the prison of Dundee, where he now lay committed
 High Court. for trial. That to enable him to prepare for his defence,
 July 18 and 20, 1864. it was necessary that the foresaid sentence of fugitation
 Petition. and outlawry should be recalled, and the present appli-
 cation was made for that purpose. He therefore prayed
 the Court for recal of the sentence, 'or to do otherwise
 'as to their Lordships should seem proper.'

Answers were given in for her Majesty's Advocate,
 stating, *inter alia*, that he had 'caused inquiry to be
 'made with regard to the reasons stated by the peti-
 'tioner for his failure to appear to answer to the said
 'indictment, viz., his having been taken ill in Edin-
 'burgh on his way to Perth, and finds that the state-
 'ment is not true.' He therefore moved that the Court
 refuse the prayer of the petition.

At calling the diet on 18th July—

GIFFORD, for the prosecution, contended, that the ap-
 plication ought not to be granted. The reason stated by
 the petitioner was untrue; the offence was bailable, and
 it was believed that the petitioner would offer bail and
 then abscond; at least, should the Court grant the
 prayer of the petition, it ought to be qualified by a con-
 dition that bail should not be taken.—Hume, vol. ii.
 p. 273.

The LORD JUSTICE-GENERAL.—That is a condition
 which we never heard of. If this is a bailable offence,
 how are we to impose such a condition?

The cause was continued until this day, when the
 Lord Justice-General stated, that having consulted the
 other Judges they had resolved to repon the petitioner
 without the qualification suggested by the Crown. The
 Crown had the security of the bail-bond for the peti-
 tioner's appearance when called on, and the Court did
 not think it necessary to arm the prosecutor with extra-
 ordinary powers.

The following interlocutor was therefore pronounced :

‘ The Lord Justice-General and Lords Commissioners
 ‘ of Justiciary having considered the petition and answers
 ‘ thereto for Her Majesty’s Advocate, and heard counsel
 ‘ for the parties : In the whole circumstances of the case,
 ‘ repon the petitioner against the sentence of outlawry
 ‘ mentioned in the petition.’

No. 112
 Michael
 Hinchy.

High Court.
 July 18 and
 20, 1864.

Petition.

NORTH CIRCUIT.

PERTH.

Sept. 20.
 1864.

Judges—THE LORD JUSTICE-CLERK AND LORD NEAVES.

HER MAJESTY’S ADVOCATE.—*Crichton A.D.—F. Deas.*

AGAINST

MICHAEL HINCHY—*J. C. Smith—R. V. Campbell.*

FABRICATION OF FALSE ACCOUNTS—USING AND UTTERING—INDICTMENT—RELEVANCY—STATUTE 1701, c. 6—WARRANT TO APPREHEND AND DETAIN.—An indictment charged, *inter alia*, ‘ the wicked and felonious fabrication of any false account for the purpose of using the same with intent to defraud ; as also the wicked and felonious fabrication of any false account or document purporting to be a receipt or discharged account, for the purpose of using the same with intent to defraud ; as also the wickedly and feloniously using and uttering as true any false and fabricated account, knowing the same to be false and fabricated, with intent to defraud ; as also the wickedly and feloniously using and uttering as true any false and fabricated account or document, purporting to be a receipt or discharged account, knowing the same to be false and fabricated, with intent to defraud.’ Objection to the relevancy of the above charges, that they did not set forth crimes cognisable by the law, *sustained*.

2. Certain charges in an indictment having been found irrelevant, the Court, on the motion of the public prosecutor, deserted the diet *pro loco et tempore*. The public prosecutor then presented an application to the Court for a warrant to apprehend and detain the panel (who was running his letters) until criminal letters were prepared. The Court refused to write upon the petition, and the panel was liberated.

No. 113.
Michael
Hinchy.

MICHAEL HINCHY, late chief constable of police for the county of Forfar, was indicted and accused—

Perth.
Sept. 30.
1864

Fabrication of False Accounts, &c. THAT ALBEIT, etc., 'the wicked and felonious fabrication of any false account for the purpose of using the same with intent to defraud; as also, the wicked and felonious fabrication of any false account or document purporting to be a receipt or discharged account, for the purpose of using the same with intent to defraud; as also the wickedly and feloniously using and uttering as true any false and fabricated account, knowing the same to be false and fabricated, with intent to defraud; as also the wickedly and feloniously using and uttering as true any false and fabricated account or document, purporting to be a receipt or discharged account, knowing the same to be false and fabricated, with intent to defraud; as also falsehood, fraud, and wilful imposition, especially when committed by wickedly and feloniously using and uttering as true any false and fabricated account, knowing the same to be false and fabricated, are crimes of an heinous nature, and severely punishable: Yet, etc.¹

CAMPBELL SMITH, for the panel, objected to the relevancy of the first four charges, on the ground that they did not set forth crimes cognisable by law. 1. The first and second charges were not distinguishable, and might be dealt with together. No value could be attached to the words 'wicked and felonious' when used in the major proposition of an indictment,—*Per* Lord Justice-Clerk (Inglis) in case of *James Miller*, High Court, Nov. 24, 1862, Irvine, vol. iv. p. 238. The word 'fabrication' had no fixed legal meaning importing a criminal act. On the contrary, looking to its derivation (*faber*,) it rather implied the doing of a thing in a superior and workmanlike manner. 'False account' also was an ambiguous expression. Every account that contained an error in addition or multiplication, was, to the extent of the error, mendacious or false. The same might be said of an account that was overcharged or twice charged.

¹ The libel, which extended over sixty-two printed pages, included no fewer than thirty-nine charges.

The phrase might even be applied to any false statement or lie, which, however immoral, was not necessarily criminal. There was one element common to all the charges objected to, viz., the intent to defraud. It was not said that that intent had been successful; that in the execution of his design the panel had obtained money or other advantage; but without such allegation a charge involving fraud was not relevant. Whatever design the panel had formed, he might have repented before proceeding to any overt act; and it was of overt acts alone that the law could take cognizance.—*James Paton*, Ayr, Sept. 22, 1858, Irvine, vol. iii. p. 208.

2. If the fabrication of a false account, &c. was not criminal, neither was the using and uttering of such a document criminal. 3. At the highest, all these four charges, taken together, did not amount to more than an attempt to defraud, which had been held not to be an indictable offence.—*James Shepherd*, Perth, April 26, 1842, Broun, vol. i. p. 325.

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of False Ac-
counts, &c.

CRICHTON, for the prosecution, in reply, admitted that the charges objected to could not be supported by authority. So far as he was aware, there was no case on record precisely parallel to the present. This admission, however, was not fatal to the charge in question. The public prosecutor was not bound to libel specific *nomina juris*. A charge was good though expressed in ordinary language, provided it plainly set forth a criminal act. In the present indictment, though falsehood—the *crimen falsi* of the Romans—was not specifically libelled, yet there were all the elements necessary to constitute that offence. It had been said that the words ‘wicked and ‘felonious’ had no force or effect when introduced into the major. That might be true in certain cases; but here these words must be read in connexion with what followed, as qualifying the various acts charged. There was, therefore, no ground for the contention that the ‘fabrication’ here libelled was not a criminal matter.—

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Hinchy.

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Fabrication
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This was not a case of forgery, but it bore some analogy to it. The charge in a case of forgery was 'Forgery, as 'also Uttering.' On the same principle, this indictment set forth, first, 'the wicked and felonious fabrication of 'any false account,' &c. ; and, secondly, the 'using and 'uttering' of such a document, both acts being charged as done 'with intent to defraud.' And just as in a case of forgery the crime was committed, so soon as the forged document was uttered, and whether the party obtained any advantage or not ; so here it was not a good objection that the intent to defraud had not been successful.—*Duncan Stalker and Thomas Wilson Cuthbert*, High Court, Jan. 22, 1844, Broun, vol. ii. p. 70.

LORD NEAVES.—Along with your Lordships I have carefully considered these objections and the answer made to them. I believe that the answer says all that can be said upon the subject ; but I am of opinion that the objections stated to the first four charges are well founded, and must be sustained. They stand on somewhat different footings. The objections to the first two are different from those of the third and fourth. The first two charges are, 1st, 'the wicked and felonious 'fabrication of any false account for the purpose of 'using the same with intent to defraud ;' 2d, 'the 'wicked and felonious fabrication of any false account 'or document purporting to be a receipt or discharged 'account, for the purpose of using the same with intent 'to defraud.' Now, it cannot admit of doubt that to fabricate a false account, for the purpose of using the same with intent to defraud, is not indictable. The law does not take cognizance of things done that do not pass into overt acts. It has nothing to do with the intent of a party, or with his secret actions, till he does something that comes to the light of day. Without that there is no crime completed. A man may devise the most atrocious designs against others, but he may repent ; he may fabricate a series of the most nefarious

documents, but if he keeps them in his desk, and never uses them, he has committed no crime cognizable in the eye of the law. The words 'wicked and felonious' will not convert into a crime that which in its own nature is not a crime. The argument founded on by the Advocate-depute in support of this charge is the only one that can be urged, namely, that the law recognises the separate crimes of forgery and uttering, and of falsehood and uttering, so that forgery is treated as constituting a crime by itself, and falsehood a crime by itself. Now, forgery in the literal sense, could not be a crime in itself. But it is used in our indictments as involving uttering, and such charges are framed to meet the case that the forger might not be the utterer, and the utterer might not be the forger. If a person is both a forger and utterer, he is guilty of both these crimes. Forgery, in order to satisfy the full meaning of the word as technically used, must be an overt act. The document must have gone forth to the world; the forgery is not committed unless this is done. The same is the case with falsehood. The *nomen juris* of forgery or falsehood thus includes, not only the fabrication of the false document, but the uttering as well. The Crown, however, is not bound in all cases to make use of *nomen juris*. The prosecutor may do as he has done here, put his major proposition into plain English; but then if he does so, the language he uses must be sufficient in itself, and in its ordinary meaning to set forth the whole *essentialia* of the crime to be charged. As at present stated, this indictment, in these two first charges, leaves it to be supposed that the fabrication was only done with the intent to defraud, but was never put in operation. That is a bad charge, and cannot be sustained. This objection applies to the first two charges. With regard to the third and fourth charges, the using and uttering these documents, there is no doubt that the wicked and felonious using and uttering of a forged instrument is a completed crime. Whether the party succeeds is of no

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consequence ; the essence of the crime is not the success, but the perpetration of the act, of giving it forth from the party to another. But here it is not alleged that the fabrication was of the nature of forgery or falsification. There is a want of sufficient description of the kind of document fabricated, or of what the criminality consisted in. There is nothing else stated than an attempt to defraud by means of written documents, which were false merely in the sense of being mendacious ; and for anything that appears the party only attempted or intended to defraud by means of using these written statements, but did not succeed. Strictly speaking, indeed, the case is not even libelled as an attempt to defraud. It is a charge of using these papers with the intent to defraud. But that cannot be a crime, unless it clearly appears that the documents are such as to constitute criminality, by the mere making and using of them, apart from fraud. It cannot be said, as a general proposition, that the making up of a false account is a crime even if it be used. I am unaware of any authority to show that the mere putting down upon paper of false words and documents, and using them, can be held a crime. The very same statements may be made orally, without any greater degree of culpability. A man comes to me and gives a wrong account verbally of some transaction. I disbelieve him and do not give him a shilling. Another man makes the same kind of statement in a letter or paper, with columns, it may be, and figures of £ s. d., constituting an account. What is the difference ? The one makes a false statement orally ; the other renders a false account, which after all is nothing but his own account. If it had purported to be the account of another man ; if it were a document bearing to be the writ of another, this might be a forgery and so a crime ; but if there is nothing else than the professed writing of the party himself, that is only a written lie, which is not a point of dittay. All that is here charged, at the utmost, is an attempt to defraud by using written state-

ments purporting to be accounts, but which were not true. If the accused here was guilty of fraud, he may be convicted under the fifth charge, which we are not now considering; but if he did not succeed, that, of course, was not fraud. Whether attempted fraud can in any case be admitted as a charge, I will not say, though I doubt it; but stated as this charge is at present, in the general terms here used, I am of opinion that it is inadmissible, and that we must sustain the objections.

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THE LORD JUSTICE-CLERK.—The first charge in this indictment is ‘the wicked and felonious fabrication of ‘any false account for the purpose of using the same ‘with intent to defraud.’ It does not appear to me that the prosecutor is entitled to any benefit from the use of the words ‘wicked and felonious.’ I said in the case of *Miller*, that ‘the proper place for these words ‘(wicked and felonious) in an indictment is in the ‘minor proposition, and when they occur in the minor, ‘they express a quality of the act which is there specifically charged; they express that which is essential ‘to the constitution of the crime—a certain condition of ‘mind on the part of the accused at the time of committing the act libelled.’ But I also added, ‘I do not ‘say that it is impossible that these words should have ‘any force or effect in a major proposition; but whatever force or effect they may have, it cannot alter ‘their settled meaning.’ In the present indictment, I regard these words as superfluous, because, whatever they are fitted to express is sufficiently expressed in the concluding words of the charge ‘for the purpose of using ‘the same with intent to defraud.’ We have, therefore, to deal with a charge of making a false account for the purpose of using the same with intent to defraud. I agree with your Lordship that this is not a relevant charge. It is quite unprecedented in practice; and I think it wants one of the elements that is absolutely essential to constitute the *crimen falsi*. I do not think

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that, according to the law of Scotland, the mere making of a writing which states a falsehood, without any use or publication of the writing, constitutes a crime. A man may take up a false, that is to say, an inaccurate account, with the dishonest purpose of obtaining money to which he is not entitled ; but that account may not be in existence for more than five minutes or five seconds ; it may be thrown into the fire, and the attempt abandoned. In such circumstances it would be absurd to say that a crime had been committed. Yet the *species facti* I have supposed would completely satisfy what is libelled in this part of the major proposition. The same objection applies to the second charge—the only difference between the two being, that the document referred to in the second charge is called ‘ a receipt ‘ or discharged account ;’ but unless that receipt or discharged account is a forged receipt or discharged account, it does not in the least degree differ from the first charge. But we are told by the prosecutor that it is not intended to libel, and that the prisoner is not charged with, forgery. It seems to me, therefore, that the second charge is equally objectionable with the first. Then we come to the charges of using and uttering false accounts. Now, these seem to be false accounts fabricated with the intent to defraud. The using of false representations for the purpose of obtaining money, or some other advantage,—the successful using of such false statements by the obtaining of money or other advantage, is a crime which has a technical name in the law of Scotland—it is called falsehood, fraud, and wilful imposition. But there is no such charge in this major proposition. The charge is of a series of attempts to commit that crime. I concur with your Lordship that the circumstance of the false representation being contained in written documents is not material. It is just the same thing as if a person had been charged with representing to some one that he was owing him money, and attempting to obtain payment of a sum of money,

well knowing that he was not entitled to it, but not succeeding. That, I hold, to be an attempt to commit fraud, but it is not a point of dittay in our law. I therefore come to the conclusion that the first four charges in the major proposition are irrelevant.

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The Court accordingly sustained the objection to the first four charges, and to that extent found the indictment not relevant.

Upon the motion of the Advocate-Depute, the diet was deserted *pro loco et tempore*.

The diet was again called on the following day (30th September), when a petition was presented in the name of 'James Moncreiff, Esquire, Her Majesty's Advocate, 'for Her Majesty's interest,' setting forth, *inter alia*,— 'That the said Michael Hinchy, upon 21st July last, 'served upon the petitioner a copy of letters of intimation under the Signet, requiring him to fix a diet for 'the trial of the said Michael Hinchy, within sixty 'days then next, in the terms and under the certifications 'contained in the Act of Parliament 1701. That it is 'the intention of the petitioner forthwith to raise or 'prepare criminal letters against the said Michael 'Hinchy, for the crime of falsehood, fraud, and wilful 'imposition; and also so as generally to comprehend 'the subject matter of said indictment, and to bring the 'said Michael Hinchy to trial, under said criminal 'letters, in terms of law; and the present application in 'these circumstances becomes necessary.'

The prayer of the petition was for 'Warrant to macers 'of Court, messengers-at-arms, and other officers of 'law, to apprehend the said Michael Hinchy, and to 'transmit and commit him prisoner to Dundee prison, 'therein to be detained until criminal letters are raised as 'aforesaid and executed against him, or until he be liberated in due course of law; or to do further or otherwise 'in the premises as to your Lordships shall seem proper.'

Counsel for the panel objected to the warrant being

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granted, on the ground that such a course was directly contrary to the provisions of the Act 1701, c. 6.

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The Advocate-Depute, in support of the petition, referred to the practice of the late Lord Justice-Clerk (Hope), who had frequently 'as Crown counsel, applied 'for and obtained warrants for detention,' in similar circumstances to the present—*Robert Smith* and *James Wishart*, High Court, March 23, 1842, Broun, vol. i. p. 134.

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The Court refused to write upon the petition. Thereafter the panel was liberated.

HIGH COURT.

Present,

THE LORD JUSTICE-CLERK,

LORDS NEAVES AND JERVISWOODE.

JAMES M'KENZIE AND OTHERS, Suspenders—*Patton*—*J. G. Smith*.

AGAINST

ROBERT WHYTE, Respondent—*A. R. Clark*—*Shand*.

SUSPENSION—INDECENT EXPOSURE OF THE PERSON—RELEVANCY.—

A complaint setting forth that certain parties had been guilty of 'the crime of indecent exposure of the person,' in so far as, 'at or 'near a part of the river South Esk situated opposite or near to 'Brechin Castle, they did wickedly and feloniously expose their 'persons in an indecent and unbecoming manner, and did take off 'their clothes and expose themselves on the banks of the said river 'in a state of nudity, to the annoyance of the lieges,'—Held irrelevant; and a conviction proceeding thereon, *suspended*.

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In July 1864, a complaint was presented in the Sheriff-court of Forfarshire by Robert Whyte, procurator-fiscal of Court, setting forth,—

That Charles Jack, clerk, now or lately residing in Pearce Street of Brechin; James M'Kenzie, clerk, now or lately residing in City

Road of Brechin; William Bruce, junior, student, now or lately residing in Dumacre Road of Brechin; Robert Crockatt, weaver, now or lately residing in City Road of Brechin; and Alexander Innes, junior, pupil-teacher, now or lately residing in High Street of Brechin, have, all and each or one or more of them, been guilty of the crime of indecent exposure of the person, actors or actor, or art and part; in so far as, on the 9th day of July 1864, or about that time, and at or near a part of the river South Esk situated opposite or near Brechin Castle, in the parish of Brechin and county of Forfar, the said Charles Jack, James M'Kenzie, William Bruce, junior, Robert Crockatt, and Alexander Innes, junior, did, all and each or one or more of them, wickedly and feloniously, expose their persons in an indecent and unbecoming manner, and did take off their clothes and expose themselves on the banks of the said river in a state of nudity, to the annoyance of the lieges.'

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The case having gone to trial, the Sheriff-substitute found the complaint proved on the evidence adduced; 'and therefore fines and amerciates the panels, the said Charles Jack and Robert Crockatt, in the sum of £2 sterling each, payable to the procurator-fiscal of Court, and ordains the said panels to be imprisoned in the prison of Forfar until they pay said fine, but not exceeding seven days from this date, and admonishes the panels, the said James M'Kenzie, William Bruce, junior, and Alexander Innes, junior, and dismisses them from the bar.'

Against this sentence Jack and Crockatt appealed to the Circuit Court held at Perth in September last, when the presiding Judges (Lords Justice-Clerk and Neaves), after hearing parties on the relevancy of the complaint, sustained the appeal, and set aside the sentence in so far as it affected the appellants.

M'Kenzie, Bruce, and Innes, brought this suspension, and argued—The complaint on which the sentence of the Sheriff-substitute proceeded was irrelevant, (1.) 'Indecent exposure of the person' was not a *nomen juris*. The expression did not even necessarily imply any culpable act. It was easy to conceive cases in which there might be indecent exposure of the person for an innocent or even laudable purpose. (2.) The *species facti*

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set forth in the complaint was insufficient to found a criminal charge. It was not said that the suspenders had exposed their persons in a place of public resort, nor even that they had been seen by a single person. For anything that appeared on the face of the libel, Brechin Castle, the *locus* of the alleged offence, might be uninhabited or in ruins. It was not enough to libel that certain things were done 'to the annoyance of the ' lieges.' If any particular persons were annoyed by the suspenders' conduct, that should have been stated. No importance could be attached to the words 'wickedly and feloniously.'—Authority cited, *Regina v. Webb*, 1848, 2 Carrington and Kirwan, p. 933.

The respondent, in support of the relevancy of the complaint, referred to the English case, *Rex v. Crunden*, 21st March 1809, Campbell's *Nisi Prius* Reports, vol. ii. p. 89.

The following opinions were delivered—

LORD NEAVES.—I have listened anxiously to this debate; but the argument has only impressed me with the necessity of caution in laying down the law on any questions not immediately before us. Some general propositions have been stated which I confess I should like to see presented in a concrete or practical form before giving an opinion on them.

I have no doubt of the soundness of the law laid down in the English case which has been quoted to us. I hold that the public exposure of the person under circumstances calculated to outrage public decency is a crime in Scotland as well as in England; but I reserve entirely my opinion as to the application of that doctrine to any supposed case not before us.

The immediate matter with which we have to deal is this indictment or libel; and I regard the question raised as entirely one of relevancy. I am to consider whether the circumstances here set forth are in themselves sufficient, if proved, to constitute a crime and authorize a conviction.

The major proposition, as it may be called, or enun-

ciation of the alleged offence, is framed with considerable particularity, and must be carefully examined, when it is made the foundation of a criminal proceeding. The argument in support of the relevancy is, that the complaint sets forth a case of criminal exposure. The question is, whether the elements that constitute such an offence are sufficiently libelled. It appears to me that the term "indecent exposure" taken simply is insufficient to constitute a crime. There is no doubt as to the criminality of that species of it which is well known to our law, and which is generally libelled under the term "lewd, indecent, and libidinous practices." But that is not the offence here charged. But in every case criminal exposure of the person must have some reference both to the impropriety of the act and to its effect on the mind of the person to whom the exposure is made. Here there is an ambiguity about the charge in both respects. What is indecent exposure? All exposure of those parts of the person that are usually concealed may, in one sense, be called indecent, but the ways in which this may be done are so various that the mere general expression will be insufficient. It is not even said here whether the whole person was exposed. A woman may be suckling her child by the roadside under circumstances which to some may constitute indecent exposure of her person. A female at a ball or in a ballet may be so dressed as to fall under a similar imputation. But even exposure of the whole person resolves into a question of circumstances. I am willing to look on this Sheriff-court charge without subjecting it to the minute criticism with which I would scan a High Court indictment, though I do not see why this libel should be very leniently treated; but even with this indulgence, and looking at this general charge with the light of what follows in the complaint, I confess I cannot find in it the elements of criminality. The mere use of the words "wickedly and feloniously" cannot affect the *corpus* of the crime, if the act is not one neces-

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sarily criminal. It is said that these things were done "at or near a part of the river South Esk situated opposite or near to Brechin Castle," etc. Now, I agree with a remark made from the bar, that this is meant as descriptive of the *locus* rather than as inferring that the neighbourhood of this house was a element in the criminality of the charge. Then it is said that these young men exposed their persons "in an indecent and *unbecoming* manner." There is something absurd in this anti-climax ; and how very vague is the word "unbecoming." But it is said that all this was done "to the annoyance of the lieges." This, however, is also vague and insufficient. Altogether, I desiderate several things in this libel. In a criminal charge I am entitled, and even bound, to suppose every state of the facts not negatived in the libel. Assume, then, that these persons intended to bathe, that they had a right to be at the place libelled, and that as regards their dress they were in the usual state of bathers, can it be said that there are here the elements of a criminal charge ? No doubt, delicate questions may arise ; and it may be true that, even where bathing is the object, a person who walks naked into a public place, or before a row of houses, may be guilty of indecent exposure in a criminal sense of that term. But is a person lawfully bathing, and undressing with a view to lawful bathing, indecently exposing his person in a criminal sense, because he may be within some short distance of an inhabited house, if such exposure is not done with any indecent purpose, or any resulting offence to decency ? I should hesitate to lay down, as a general rule, that a man cannot bathe in his own river or in the sea, because there may be one dwelling-house not far off, whether a castle or a cottage, or because I may possibly be seen by one man or one woman. It is not said that these youths were there in pursuance of any unlawful purpose. It is not even said that the house which was near them was then inhabited. I find nothing here of the necessary

and essential elements of crime by an outrage on public decency ; and when I see how many doubtful or debatable cases may be conceived, and how easy it would be, by taking an *ultra* view of such a case as this, to get up an oppressive proceeding founded on nothing that might look like a criminal charge, it is the more necessary that we should have speciality of averment. Let it not be supposed that a scandalous or outrageous insult to public decency is to go unpunished. The law has ample powers to meet such a case ; but I do not see in this case any of the necessary elements for such a charge.

LORD JERVISWOODE concurred.

The LORD JUSTICE-CLERK.—There is no doubt that indecent exposure of the human person under certain circumstances and conditions, and with certain effects, is a crime known to the law of Scotland. But so far as I am aware, there are only two kinds or classes of this crime. The one is an offence against private persons ; the other an offence against public morals. The former is, what is well known under the description of ‘lewd, indecent, and libidinous practices,’ where a person exposes himself with the view and with the effect of corrupting the moral of others. The latter consists in an indecent exposure of the person in a public place, or where it is seen by many people, and constitutes an offence against public decency. But we are asked, as a necessary condition of sustaining the relevancy of this complaint, to affirm the proposition that indecent exposure of the person, irrespective of the circumstances and conditions under which it is made, or the effects flowing from it, is always a crime by the law of Scotland. In judging of this question, we must first inquire: whether the term ‘indecent exposure of the ‘person’ has received any fixed technical signification, or is a *nomen juris* ; in other words, whether it is the recognised and fixed name of a particular crime or class of crimes. To that question I apprehend a negative answer must be returned. There is no trace, so far as

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I can learn, of anything like the affixing of a technical signification to these words in any criminal libel, or in any authority on the criminal law of Scotland. If, then, they have no technical signification, we must take them in their common meaning; and the question comes to be, whether every indecent exposure of the person is necessarily a crime. I think there may be indecent exposure of the person for laudable and innocent objects, and I cannot concur with what was urged from the bar, that the use of the term 'indecent' as regards the mode of the exposure which takes place, necessarily implies some indecency upon the part of the individual whose person is exposed—an indecent motive, or object, or feeling upon his part. I do not think it implies that by any means, and I think that, in many of the illustrations which were used in the course of the argument, it might fairly be said that there is an indecent exposure of the person, although the circumstances in which, and the purposes for which, it is made, make it not only excusable or justifiable, but even laudable. But still, if it were necessary, in order to satisfy the meaning of the term 'indecent exposure of the person' in its popular and ordinary signification, that there should be something immoral upon the part of those who had exposed their persons, I should still think that there are many cases of exposure that are not criminal; and of these some examples were given in the course of the argument. Without the slightest hesitation, therefore, I arrive at the conclusion that indecent exposure of the person is not in itself a crime by the law of Scotland. But what is the *species facti* with which we have to deal in this libel? It is said that 'at or near a part of the river South Esk, situated opposite or near to Brechin Castle,' the accused 'did expose their persons in an indecent and unbecoming manner, and did take off their clothes, and expose themselves, on the banks of the said river, in a state of nudity, to the annoyance of the lieges.' Now, is that the offence against private

persons which we know under the general name of lewd and libidinous practices? It cannot be that. On the other hand, is it that offence against public morals, which consists of a person exposing himself in a state of nudity, or partial nudity, in a public place, or where he can be seen by a multitude of people? There is nothing within the four corners of this complaint to justify us in supposing that the place which these persons selected for undressing themselves was a place where they might naturally expect to be seen by anybody whatever. It is said that they were in the neighbourhood of a house called Brechin Castle; but it is not said that that house was inhabited, or that the place was in itself otherwise a place of public resort, or a place that could be seen from any place of public resort. It is not said that any persons were there and saw the accused; and I think, therefore, it clearly does not amount to that offence against public morals to which I have referred, which consists of the exposure of the person in a reckless and indecent way, so as to be seen by a number of people in some public place. Upon the libel itself, therefore, I entertain no doubt, whether you take its general description or its special description. The words 'to the annoyance of the lieges' are of no value whatever in strengthening this complaint, because it is not said how the lieges were annoyed. If it is meant that the public were annoyed by seeing a number of persons in a public place, that surely should be stated, and not be left to inference. Therefore I concur with both your Lordships in holding that this libel is in every way irrelevant. When the former case was heard before Lord Neaves and myself at Perth, I took the liberty of suggesting that we should see the notes of the evidence, for this reason, that I wished to be satisfied that there was not really behind this irrelevant complaint some substantial case in fact that would have amounted to a criminal offence by the law of Scotland. Lord Neaves and I

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looked at the evidence, and we found that the evidence and the libel corresponded most accurately, and that there was nothing more proved than was stated in the libel; and so we came with all the more satisfaction to the conclusion which we expressed in our judgment then, that this occurrence, both in the form of libelling it, and in the actual facts as disclosed in the evidence, was not a crime by the law of Scotland. Upon these grounds, I concur with your Lordships in thinking that the note of suspension ought to be passed.

Sentence suspended.

FERGUSON & JUNNER, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIE, W.S.—Agents.

Present,

Dec. 19.
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THE LORD JUSTICE-CLERK,

LORDS NEAVES AND JERVISWOODE,

HER MAJESTY'S ADVOCATE—*Gifford A.D.*

AGAINST

MICHAEL CURRIE AND OTHERS.—*J. C. Thomson.*

MOBBING AND RIOTING—BREACH OF THE PEACE—INDICTMENT—RELEVANCY—VERDICT—SENTENCE.—An Indictment charged the panels with Mobbing and Rioting, as also, Breach of the Peace, and with one or other of these crimes, actors or art and part. The Jury found the panels not guilty of Mobbing and Rioting, but guilty of Breach of the Peace—Objection, that no sentence could follow on the verdict, in respect that there was no charge of breach of the peace against the panels individually, apart from the charge of mobbing and rioting—repelled, on the grounds, (1.) That it came late, being excluded by the interlocutor of relevancy; and, (2.) That the objection itself was bad, even if it had not been so excluded.

2. Three panels convicted of breach of the peace, sentenced to nine months' imprisonment.

MICHAEL CURRIE, HUGH M'QUAADE, PETER CAMPBELL, PATRICK MARTIN, and JOHN BOYLE, were indicted and accused :—

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and Riot-
ing, &c.

THAT ALBEIT, by the laws of this and of every other well-governed realm, Mobbing and Rioting; As also Breach of the Peace, are crimes of an heinous nature, and severely punishable: YET TRUE IT IS AND OF VERITY, that you the said Michael Currie, Hugh M'Quaade, Peter Campbell, Patrick Martin, and John Boyle are, all and each or one or more of you, guilty of the said crimes, or of one or other of them, actors or actor, or art and part: IN SO FAR AS, on the 12th or 13th day of November 1864, or on one or other of the days of that month, or of October immediately preceding, a mob, or great number of riotous and evil-disposed persons, of which you the said Michael Currie, Hugh M'Quaade, Peter Campbell, Patrick Martin, and John Boyle, all and each or one or more of you formed part, did, in a riotous and tumultuous manner, and in breach of the public peace, and to the great alarm of the lieges, assemble near the Bell Stane, in or near South Queensferry, in the county of Linlithgow, and in or near the High Street, and in or near Goat or Gote Lane, South Queensferry aforesaid, and in other streets or places in or near South Queensferry, or in one or more of said places, for the illegal purpose of masterfully attacking, injuring, and maltreating the peaceable inhabitants or residents in South Queensferry aforesaid, employed as labourers or workmen in South Queensferry, and for the illegal purpose of attacking, injuring, or destroying the building in or near South Queensferry, known as the Mission School, which is occupied as a school, and also as a place for conducting religious services by ministers and others of the protestant religion, the larger number of the said mob, or greater number of riotous and evil-disposed persons, consisting of labourers who had recently come to work in the neighbourhood of South Queensferry aforesaid, and of Roman Catholics, or for one or other of the said illegal purposes, or for some other illegal purpose or purposes to the prosecutor unknown; or the said mob, or great number of riotous or evil-disposed persons, being together at the time and place or places above libelled, did take up or form the unlawful purpose or purposes above libelled, or one or more of them; and the said mob, or great number of riotous and evil-disposed persons, did, time above libelled, at or near the Bell Stane, in South Queensferry, and in or near Goat or Gote Lane, South Queensferry aforesaid, and in or near a field called Friar's Croft, situated on the farm of Echline, in the parish of Dalmeny, and county of Linlithgow, and which farm is in the occupation of George Thomson, farmer, now or lately residing there, wickedly and feloniously, conduct themselves in a riotous and outrageous manner, in breach of and to the disturbance of the public peace, and to the great terror and

No. 115. alarm of the lieges, and did throw many stones or other missiles to
 Michael the injury of persons and property; and in particular, the said mob,
 Currie and or great number of riotous and evil-disposed persons, did, wickedly
 Others. and feloniously, attack and assault sundry persons, and among others,
 High Court. did, wickedly and feloniously, attack and assault Samuel Rodgers,
 Dec. 19. now or lately baker, in the employment of Robert Broomfield, baker,
 1864. in or near South Queensferry aforesaid, and Alexander Bringan, now
 Mobbing or lately joiner, in the employment of James Wood, joiner, in or near
 and Riot- South Queensferry aforesaid: AND FURTHER, the said mob, or great
 ing, &c. number of riotous and evil-disposed persons, did, time above libelled,
 proceed to the said building in or near South Queensferry aforesaid,
 known as the Mission School, and did, wickedly and feloniously,
 and in a riotous and outrageous manner, attack said Mission School,
 and did throw stones or other missiles against the said Mission School,
 and did break and destroy several panes of glass in the windows
 thereof: FURTHER, the said mob, or great number of riotous and
 evil-disposed persons, did, time above libelled, in or near Goat or
 Gote Lane, in or near South Queensferry aforesaid, wickedly and
 feloniously, attack and assault Alexander Crockett, now or lately
 labourer, and residing in or near South Queensferry aforesaid; John
 Greig, now or lately plasterer, and residing with the said Alex-
 ander Crockett; and Donald M'Leod, now or lately police-con-
 stable in the Linlithgowshire Police, residing in South Queensferry
 aforesaid, or one or more of them: FURTHER, the said mob, or great
 number of riotous and evil-disposed persons, did, time above libelled,
 on or near the street or road opposite or near to Wester Terrace, in or
 near South Queensferry aforesaid, wickedly and feloniously, attack
 and assault James Wood, joiner and house-carpenter, and residing in
 or near Wester Terrace, in or near South Queensferry aforesaid; and
 all the acts above libelled the said mob, or great number of riotous and
 evil-disposed persons, did in pursuance of the illegal purpose or pur-
 poses above mentioned, or one or more of them: And you, the said
 Michael Currie, Hugh M'Quade, Peter Campbell, Patrick Martin,
 and John Boyle, did, all and each or one or more of you, form part of
 said mob, or great number of riotous and evil-disposed persons, and
 were, all and each or one or more of you, present at, and aiding and
 abetting, and actively engaged with the said mob, or great number of
 riotous and evil-disposed persons, in the acts of mobbing and rioting
 and breach of the peace above libelled, or part thereof.

The indictment was found relevant without objection,
 and the panels pleaded Not Guilty.

After a lengthened trial the following verdict was
 returned—

' The Jury find the panel John Boyle not guilty;

' unanimously find the other panels not guilty of Mobbing and Rioting, but unanimously find them guilty of a very serious Breach of the Peace.'

No. 115.
Michael
Currie and
Others.

High Court.
Dec. 19.
1864.

Mobbing
and Rioting,
&c.

THOMSON, for the panels, objected to any sentence passing on this verdict, in respect that the indictment contained no specific charge of breach of the peace against the prisoners as individuals, but only as part of a mob, which the Jury had found to have no existence. —*James Farquhar and others*, Aberdeen, April 30, 1861, Irvine, vol. iv. p. 28.

LORD NEAVES.—I cannot concur in the objection which has been taken to this verdict, and that for two reasons:—In the first place, it is not stated at the proper stage, it ought to have been stated as an objection to the relevancy. The indictment challenges objection in all its parts. It charges the panels not only with the crime of mobbing and rioting, but also with breach of the peace, or one or other of these crimes, actors or art and part. We have found the indictment relevant, and the objection now stated comes too late. But (2.) I think the objection in itself ill-founded. The case of rioting is quite different from most others. There may not be mobbing in the technical sense of that term, but if a great number of disorderly persons do acts of violence to the public peace, and to the terror of the lieges, I cannot doubt that they are guilty of breach of the peace, though there may not be that common purpose which is essential to mobbing and rioting.

LORD JERVISWOODE concurred with Lord Neaves.

The LORD JUSTICE-CLERK was of the same opinion on both grounds. The objection came too late, and was excluded by the interlocutor of relevancy. He was also of opinion that the objection itself was bad, and was clearly distinguishable from that taken in the case of *Farquhar*.

The Court assoilzied the panel Boyle, and sentenced each of the other panels to be imprisoned for nine calendar months.

WEST CIRCUIT.

Dec. 27.
1864.

Winter 1864.

Judge—LORD ARDMILLAN.

HER MAJESTY'S ADVOCATE—*A. Moncrieff A.D.*

AGAINST

WILLIAM MORRISON—*Crawford.*

AND

MARY CURRAN OR SMITH—*Brand.*

BASE COIN—STATUTE 24TH AND 25TH VICT. c. 99—INDICTMENT—
MINOR PROPOSITION—RELEVANCY.—A charge under the 12th section of the Act 24th and 25th Vict. c. 99 found irrelevant, in respect that previous conviction was not averred in the subsumption.

No. 116.
William
Morrison
and Mary
Curran.

Glasgow.
Dec. 28.
1864.

Base Coin.

WILLIAM MORRISON and MARY CURRAN were charged with the crimes and offences set forth in the 9th and 10th sections of 24th and 25th Vict. c. 99 ; and William Morrison was further charged with the high crime and offence set forth in the twelfth section. By the twelfth section it is enacted, 'that whosoever having been convicted, either before or after the passing of this act of any such misdemeanour, or crime and offence, as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former act relating to the coin, shall afterwards commit any of the misdemeanours or crimes and offences in any of the said sections mentioned, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for life,' &c.

In the subsumption seven acts of uttering in contravention of the ninth and tenth sections of the Statute,

were alleged to have been committed by Morrison. But it was not stated that he had been previously convicted.

No. 116.
William
Morrison
and Mary
Curran.

An extract copy of a conviction under the coining acts was libelled as one of the productions to be used in evidence against Morrison.

Glasgow.
Dec. 28.
1864.

Base Coin.

CRAWFORD, for the panel Morrison, submitted—That the libel was irrelevant in so far as laid upon the twelfth section. To constitute the statutory high crime and offence created by that section two elements are necessary, an act of contravention of the preceding sections, and previous conviction. But the previous conviction was not averred in the minor.

The ADVOCATE-DEPUTE replied—That the first part of the minor which charged the panel with the high crime and offence set forth in the twelfth section, necessarily implied that he had been previously convicted, and especially as the extract copy of the conviction was libelled as a production the allegation was sufficiently specific, though the fact of previous conviction was not narrated in the subsumption.

Objection sustained—and this charge delete from the indictment.

The panel Morrison pleaded guilty to the first, second, fourth, and fifth charges, and was sentenced to eighteen months' imprisonment.

The diet against the female panel was deserted *simpliciter*.

NORTH CIRCUIT.

Sept. 30.
1884.

PERTH.

Judges—THE LORD JUSTICE-CLERK AND LORD NEAVES.

HENRY SPEID, Appellant—*Millar*,

AGAINST

ROBERT WHYTE, Respondent—*F. Deas*.

APPEAL—WILFUL AND MALICIOUS MISCHIEF—ASSAULT—ALTERNATIVE CHARGE—CONVICTION—A Complaint in the Sheriff Court charged wilful and malicious mischief, as also assault, or one or other of these crimes. The Sheriff-Substitute found 'the complaint proved on the evidence.' On appeal it was contended that this finding was bad from uncertainty. The Court, while in the particular circumstances of the case they set aside the judgment, were of opinion that it was not incorrect in point of form.

No. 117.
Speid v.
Whyte.

Perth.
Sept. 30.
1884.

Appeal.

THIS was an appeal from a conviction and sentence by the Sheriff-Substitute at Forfar, on a complaint at the instance of the respondent, Procurator Fiscal of Court, setting forth that the appellant was guilty of the 'crime of wilful and malicious mischief, as also of the crime of assault, or of one or other of the said crimes, actor or 'art and part,' in so far as, on the 14th June, he cut part of the harness of a horse belonging to Andrew Doig, farmer, Middle Drum, and did assault two other persons named in the complaint.

It appeared that the appellant had a sale of hag-wood, which was lying in one of the plantations near his house, and that by certain articles of roup this wood had to be carted away by the avenue on certain days only, it being a condition that it should be paid for before being removed.

According to the prosecutor's evidence two lots of the wood lay so far within the plantation, that no person would offer for them at the sale, they not being worth

the expense of being dragged to the avenue and thence carted away. These lots were lying close to a field occupied by Doig, the tenant of one of the appellant's largest farms ; and the auctioneer at the sale asked Doig to buy them as he could get access to them easily. Doig agreed to purchase, and did purchase, the lots for a few shillings, on the understanding that he should be allowed to remove them at once. Accordingly, he next morning caused several of his servants to throw the wood from the plantation over the dyke into his own field, as it was obstructing the cultivation of it. While these men were engaged in loading the carts they were interrupted by the appellant, who came upon the field and ordered them to empty the carts. The foreman declined to do this, but offered to go for his master before removing any more of the wood. The appellant would not listen to this proposal, but began to cut the harness of one of the horses, and when the foreman endeavoured to lead the horse forward, the appellant assaulted him with a stick ; he also assaulted one of the other men at the same time.

No. 117.
Speid v.
Whyte.
Perth.
Sept. 80.
1864.
Appeal.

The Sheriff-Substitute found 'the complaint proved ' on the evidence,' and fined the appellant in the sum of Ten Pounds.

Against this judgment Speid appealed to the Circuit Court of Justiciary.

MILLAR contended, in support of the appeal, first, that the sentence was uncertain, it being impossible to discover whether Mr Speid was found guilty of the charge of malicious mischief, or of assault, or of both, the Sheriff having found 'the complaint proved on the evidence.' He also argued on the facts of the case that Mr. Speid was not guilty of malicious mischief. At the time the mischief is said to have been committed, the men were engaged in illegally carrying away wood which was the property of the appellant. He was therefore only acting in vindication of his own rights.

No. 116.
Speid v.
Whyte.

Perth.
Sept. 30.
1864.

Appeal.

DEAS for the respondent maintained that the judgment was quite regular and legal.

LORD NEAVES, in delivering the judgment of the Court, said—An objection has been stated to the effect that the judgment of the Sheriff is unintelligible, in respect that while the crimes of malicious mischief and assault, or one or other of them, are charged in the complaint, the judgment generally finds the complaint proved. I think that the judgment was correct in point of form. But the judgment must be quashed on other grounds. I am of opinion—after having read the Sheriff's notes of evidence—that the circumstances disclosed did not warrant the judgment, because they do not amount to that reckless and wilful destruction of property which is essential to the constitution of the crime of malicious mischief. Mr. Speid was undoubtedly the proprietor of the wood till the conditions of sale were implemented, which they had not been ; and although he may not have acted judiciously, or even legally, in the course he adopted to vindicate his property, still he did act in vindication of his supposed rights, and not merely from a desire to injure or destroy the property of another. The conviction must therefore be quashed.

MILLAR moved for the repetition of the fine, and for expenses.

LORD NEAVES.—I see no reason why these ought not to follow as matter of course.

The Court sustained the appeal, recalled the judgment complained of, and ordained the respondent to repay to the appellant the sum of ten pounds, being the fine imposed by said judgment, and expenses.

ALEX. MORRISON, S.S.C.—THOMAS SOUTAR, Solicitor, Crief—JAMES TAYLOR,
Writer, Forfar—Agents.

APPENDIX.

EXTRACTS from the Speeches of the LORD ADVOCATE and
Mr. MURE in the Debate in the House of Commons
on the case of JESSIE MACKINTOSH, or M'LAUCHLAN.
See p. 220.

Mr. DENISON considered it of the greatest importance that some one acquainted with the subject—the Lord Advocate probably—should inform the House whether it was at this moment the law of Scotland that a person examined on a capital charge as a witness should never afterwards be liable to be prosecuted for that offence. He could scarcely believe that such was the state of the law in such a rational country as Scotland.

The LORD ADVOCATE.—I cannot refuse to answer the appeal which has been made to me, and probably one sentence will be sufficient. With regard to the law of Scotland, I am asked whether a person who has given evidence on a trial can afterwards be tried on the same charge? My impression, my opinion, undoubtedly is, that he cannot be tried, and that such is the law of Scotland. I am not prepared to admit that that is necessarily a bad state of the law. It is exceedingly desirable for the ends of justice that witnesses should be able to give their testimony without the fear of personal consequences. When a party is in suspicious circumstances, the ordinary course is, if the judge sees that the circumstances are suspicious, that the judge will warn the witness that nothing that he can say will be brought against him, and that he cannot be tried in relation to the matter; and although in this case that caution was not given, my opinion is, that if we had attempted to place Fleming at the bar he would not have been liable to be tried.

Mr. MURE would only say a few words on another point in this case. With all deference to his honourable and learned friend, he would say that there was no authority in the law of Scotland for the doctrine which he had laid down, that a person once examined as a witness on any criminal charge could not afterwards be tried for a supposed participation in the crime. It was undoubtedly the law of Scotland that where a person being *socius criminis* was put into the witness-box, and the judge informed him that if he told the truth he need not be apprehensive of the consequences, that man would be protected by the law of Scotland.

But when a person was put into the witness-box, and gave evidence, there being no suspicion against him at the moment that he was *particeps criminis*, and he gave his evidence voluntarily, and it afterwards turned out that there was reason to believe that he was the person who committed the crime, there was nothing in the law of Scotland which said that he should not be tried for it. There was no authority or decision on the point. But in a case where the criminal was warned by the judge, so far as decided cases went, and so far as constitutional writers had expressed their opinion, the law was as he had stated.

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**ABDUCTION OF A CHILD.** See **PLAGIUM.**

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**ALTERNATIVE CHARGE.** See **CHILD-MURDER.** **CULPABLE  
HOMICIDE.** **MALICIOUS MISCHIEF.** **PLAGIUM.**

#### **APPEAL.**

1. In an action against a Railway Company, the summons was served at Keith, in the county of Banff, and at Inverness, the statutory domicile. The cause of action arose in the county of Elgin, and the action was brought in the Sheriff Small-Debt Court of Banffshire. The Sheriff-Substitute dismissed the action on the ground of no Jurisdiction—*Held*, on appeal to the Circuit Court, that he was right in so doing. *Edward v. Inverness and Aberdeen Junction Railway*, Aberdeen, April 24, 1862, p. 185.
2. Circumstances under which appeal to the Circuit Court held incompetent. *Buchanan v. Glasgow Corporation Water-Works Commissioners*, Glasgow, September 19, 1862, p. 225.
3. In a prosecution before a Justice of Peace Court, at the instance of the Procurator-fiscal, for contravention of the Solway Act, the complaint was dismissed, but expenses were refused to the respondent. On appeal to the Circuit Court, expenses were granted to the appellant, it being held that, as any one of the public could prosecute under the Act, the fact of the prosecutor being a public officer gave him no privilege. *Walker v. Jones*, Dumfries, September 27, 1862, p. 234.
4. A pursuer obtained decree in absence in a Sheriff's Small Debt Court, and charged the defender on the decree. The charge became imperative by the lapse of a year, and he gave a new charge.—*Held*, that the defender might have execution sisted, and the case heard at any time within three months of the second decree. *Lockie and Co. v. Brown*, Aberdeen, April 28, 1863, p. 363.
5. Objections to a conviction for fishing with stake nets during weekly close-time in contravention of the Salmon Fisheries, (Scotland) Act 1862.—(1.) That the Justices who heard the complaint were not the same Justices who granted warrant; (2.) that the concurrence of the Procurator-fiscal was necessary, and had not been procured; (3.) that the *locus* was not sufficiently described; (4.) that as no bye-laws as to weekly close-time had been made under the Act, its provisions in that re-



APPEAL—*continued.*

- spect had not come into operation; and, (5.) that the charge being alternative that the appellant did fish for or take salmon, the conviction which was a general one of guilty was bad for uncertainty—*repelled. Tough v. Jopp*, Aberdeen, April 28, 1863, p. 366.
6. A conviction for fishing during weekly close-time in contravention of the Salmon Fisheries Act of 1862, set aside on appeal in respect the special facts found proved, did not establish the offence charged. *Greig v. Jopp*, Aberdeen, April 28, 1863, p. 369.
  7. Under the 16th section of the Sheriff Small Debt Act it is incompetent for the Sheriff-Clerk to issue a warrant sisting execution on a small debt decree after a poinding has been executed. The defender in a small debt action appeared at the first calling and got the cause continued, but without stating any defence. At a subsequent diet he failed to appear, and decree was given against him 'in absence.' Question whether this was properly a decree in absence. *Rowan v. Mercer*, Ayr, May 12, 1863, p. 377.
  8. Objection to the competency of an appeal to the Circuit Court from a Sheriff's Small Debt Court, on the ground that neither the decree appended to the original summons nor any certified copy thereof was produced—*repelled*, in respect that the Sheriff Small Debt Court Book contained the decree of the Court. (2.) Held that an informality in the statement of the Account did not vitiate the instance.—*Sinclair v. Rosa*, Glasgow, April 25, 1863, p. 390.
  9. A complaint under the third section of the Act 13th Geo. III, c. 54, charging a person with having game in his possession, 'he not being qualified to kill game in Scotland, nor having leave from a qualified person to do so,'—sustained as relevant, although the person complained against had a licence under the Act 23d and 24th Vict. c. 90. *Stevenson v. Melville*, High Court, May 25, 1863, p. 411.
  10. After a poinding has been enacted it is incompetent to grant a sist of execution on a small debt decree. (2.) Objection to a Circuit Court Appeal that the copy appeal and relative bond of caution were not signed by the appellant—*repelled. Wyllie v. Lawson*, Ayr, Sept. 16, 1863, p. 441.
  11. A person who had been acquitted in a Justice of Peace Court, of a charge under the Poaching Act 25th and 26th Vict. c. 114, sect. 2, was afterwards charged before the Sheriff with contravention of the Preservation of Game Act, 13th Geo. III. c. 54, sect. 3. The two complaints were at the instance of different prosecutors, but the facts founded on in each were substantially the same. In bar of trial upon the second complaint, the accused pleaded *res judicata*, and this plea was

**APPEAL—continued.**

- sustained by the Sheriff.—Held, on appeal to the Circuit Court of Justiciary, that the plea of *res judicata* was not well founded, in respect that the offence with which the man was charged before the Sheriff was different from that of which he had been acquitted by the Justices. *Galloway v. Somerville*, Glasgow, Oct. 5, 1863, p. 444.
12. An appeal taken from a decision of Justices of Peace in Quarter Sessions to the Court of Justiciary—held incompetent under the 33d and 34th Sections of the Public Houses Acts Amendment (Scotland) Act, 1862. *Purdie v. Mitchell*, Glasgow, Oct. 8, 1863, p. 447.
13. A Sheriff found a complaint under the Salmon Fisheries Act ‘not proved.’ The procurator appealed to the Circuit Court of Justiciary, asking that the judgment of the Sheriff should be recalled, on the ground that certain evidence had been improperly admitted at the trial. The case having been certified to the High Court, the appeal was sustained as competent. *Blair v. Mitchell*, High Court, July 9, 1864, p. 545.
14. An appeal to the Circuit Court of Justiciary against a small debt decree *dismissed*, in respect the appellant produced no certified copy of the decree, or proof that it had been pronounced. *Baxter v. Kennedy*, Perth, Sept. 11, 1861, p. 84.
15. A complaint in the Sheriff Court charged wilful and malicious mischief, as also assault, or one or other of these crimes. The Sheriff-substitute found ‘the complaint proved on the evidence.’ On appeal it was contended that the finding was bad from uncertainty. The Court, while in the particular circumstances of the case they set aside the judgment, were of opinion that it was not incorrect in point of form.—*Speid v. Whyte*, Perth, Sept. 30, 1864, p. 584.

See also **SUSPENSION**, 3, 9.

**APPROPRIATION.** See **THEFT**, 3, 4.

**ASSAULT.**

In a charge of assault alleged to have been committed against a lunatic patient by two keepers in an asylum, a witness for the prosecution deposed that he asked the lunatic ‘Who had assaulted him?’ The question objected to by the prisoner’s counsel, and disallowed by the Court, the lunatic not being on the list of Crown witnesses, and there being no proof that he was incapable of giving evidence. (2.) Two keepers in an asylum sentenced to six months’ imprisonment for an assault on a lunatic patient. *Adam Coupland and William Beattie*, Dumfries, April 14, 1863, p. 370.

See **MALICIOUS MISCHIEF. MOBBING AND RIOTING.**

**ASSAULT WITH INTENT TO RAVISH.** See RAPE.

**ATTEMPT TO COMMIT HOUSEBREAKING.**

See HOUSEBREAKING WITH INTENT TO STEAL.

**ATTEMPT TO BREAK PRISON, &c.**

An objection to an indictment, which charged, *inter alia*, 'the  
' attempting to break prison,' that this was not a crime known  
to the law of Scotland—*repelled*. *Robert Smith*, Perth, Sept.  
17, 1863, p. 434.

**ATTEMPT TO MURDER BY POISON.**

*Held*, (1.) 'That Attempt to Murder by means of Poison,' and  
' Attempt to Administer Poison with the intent of doing great  
' bodily injury,' are relevant points of dittay by the law of  
Scotland; (2) That it is not necessary, in order to constitute  
these crimes, that the poison should actually be taken by the  
person for whom it is intended. *Samuel Tumbleson*, Perth,  
Sept. 17, 1863, p. 426.

**ATTEMPT TO COMMIT WILFUL FIRE-RAISING.** See  
WILFUL FIRE-RAISING.

**BAIL-BOND, FORFEITURE OF.** See DOMICILE.

**BANKRUPTCY.** See FRAUDULENT CONCEALMENT OF PROPERTY.  
SUSPENSION, 21.

**BASE AND COUNTERFEIT COIN.**

1. Objection to the relevancy of an indictment for uttering base coin on two occasions within ten days of each other, that it did not set forth that the coin uttered on the second occasion was different from that uttered on the first—*Repelled*, after inquiry as to the practice of libelling such cases; but observed by the Court, that the form of libelling ought to be made more distinct in future. *Anderson v. Blair*, High Court, Jan. 14, 1861, p. 5.
2. An indictment charging offences against the Coinage Act, 24th and 25th Vict. c. 99, ought to be framed, and the trial conducted according to the forms and procedure in use in Scotland; and the provisions in the 37th section as to the mode of libelling previous convictions, and as to the mode of trial in the case of previous convictions, do not apply to trials in Scotland. (2.) Previous convictions are therefore to be set forth in the indictment in the usual manner, the provision that the substance and effect of such convictions should be set forth, not referring to procedure in Scotland. (3.) A panel is relevantly charged with the high crime and offence in the 12th section (uttering, or possessing with the intention to utter counterfeit coin, after a previous conviction), although the previous conviction libelled be a conviction by the English Court. *C.S. Davidson and S. Francis*, High Court, Feb. 2, 1863, p. 292.
3. In an indictment under 24th and 25th Vict. c. 99, sect. 10, charging two acts of uttering base coin, the second act was

**BASE AND COUNTERFEIT COIN—continued.**

- alleged to have been committed, 'time and place above 'libelled,' and being on the day 'of the first uttering,' or within the space of ten days then next ensuing.—Objection, (1.), That the two acts of uttering constituted one offence, and ought to have been so charged; and, (2.), That the indictment ought to have been simply in terms of the Statute—on 'the 'day of such uttering,' *repelled*. (3.) It is incompetent under the above Statute to charge a panel with having in his possession the same base coins which in a previous article of the libel he is charged with uttering. *Matthew Weir and Jacob Hull*, Glasgow, April 21, 1864, p. 495.
4. A charge under the 12th section found irrelevant, in respect that previous conviction was not averred in the subsumption. *William Morrison and Mary Curran*, Glasgow, Dec. 28, 1864, p. 514.

**BIGAMY.**

1. In a trial for Bigamy, a marriage alleged to have taken place in Ireland, held not to have been sufficiently proved, in respect the public prosecutor had failed to adduce evidence as to the Irish law of marriage. *Margaret Lyons or M'Gonigle*, Glasgow, April 25, 1864, p. 503.
2. Objection to the relevancy of an indictment for Bigamy, on the ground that both marriages were irregular—*repelled*. *Abraham Langley*, High Court, June 9, 1862, p. 190.

**BILL OF EXCHANGE.** See **FORGERY**, 2.

**BREACH OF THE PEACE.** See **MOBBING AND RIOTING**.  
SUSPENSION, 4, 5.

**BREACH OF TRUST.** See **THEFT**.

**CHARACTER OF WOMAN IN CASE OF RAPE.** See **RAPE**.

**CHARGE.** See **APPEAL**, 4.

**CHILD-MURDER.**

1. In a charge of child-murder, after a specific description of the *modus*, was an alternative statement, 'or did in some other 'way to the prosecutor unknown, maltreat the said child.' Objection to these words as not sufficiently specific, *repelled*. *Alexandrina or Lexy Clark and Jane M'Kay*, Inverness, Sept. 25, 1861, p. 91.
2. In an indictment charging Murder against two panels, and Concealment of Pregnancy alternatively against one of them—*Held*, (1.) competent, on the motion of the prisoner's counsel, to separate the trials to the extent of dealing with each charge separately; (2.) That neglect to tie the umbilical cord formed a relevant charge of Child-murder as part of the *modus* generally set forth. *Elizabeth Duncan and Ann Brechin*, Perth, Sept. 29, 1862, p. 206.

See also **EVIDENCE**. **MODUS**, 1, 2.

CIRCUIT COURT. See JURISDICTION.

CITATION.

Under the Day Poaching Act, 1st and 3d Will. IV. c. 68, no formal copy of citation is required, if a copy of the deliverance of the Justices, ordering the party to appear at the time and place specified is duly served upon him. *Harcourt and Priestly, v. Low*, High Court, Jan. 14, 1861, p. 1.

See DOMICILE.

CIVIL AND CRIMINAL.

A prosecution for contravention of the Salmon Fisheries Act 1862, is a criminal proceeding, and therefore the person accused is not a competent witness for himself. *Blair and Mitchell, &c.*, High Court, July, 9, 1864, p. 546.

See SUSPENSION.

CLERGYMAN (CONFESSION TO.) See EVIDENCE, 4.

CLOSE-TIME (Salmon). See APPEAL, 5, 6, 12.

COMPETENCY. See APPEAL, 1. EVIDENCE. SUSPENSION.

CONFESSION TO CLERGYMAN. See EVIDENCE, 4.

CONTEMPT OF COURT. See EVIDENCE, 4.

CONVICTION. See SUSPENSION, 3, 5, 7, 11, 12, 13, etc.

CULPABLE HOMICIDE.

1. An Objection to the relevancy of an indictment, charging culpable homicide by running down a fishing-boat, whereby three persons were drowned; that the libel was too general, and did not sufficiently specify wherein the culpability consisted—repelled. *Angus Macpherson and John Stewart*, Inverness, Sept. 24, 1861, p. 85.
2. Opinion that it is contrary to sound principle to charge in the same major proposition Culpable Homicide and its equivalent, 'Culpable and Furious Driving, whereby any of the lieges are bereaved of life,' but the relevancy sustained in respect of the practice. *Robert Lonie*, Perth, Sept. 29, 1862, p. 204.
3. Objection sustained to the relevancy of an alternative charge in an indictment for culpable homicide. *Thomas Phillips*, Glasgow, April, 23, 1863, p. 385.
4. Objection sustained to the relevancy of an indictment which charged the panel, a druggist's apprentice, with the crime of culpable homicide, in so far as he had held himself out as a competent person to prescribe a proper medicine for a child, and had failed to inform himself, by inquiry at the parent, of the child's age and state of health or strength. *Charles Buchan*, Stirling, May 5, 1863, p. 392.
5. Objection to the relevancy of an indictment charging an engine-driver with culpable homicide, or culpable violation and neglect of duty, in consequence of which a collision took place and several persons were injured and one killed,—that certain words occurring in the minor proposition, where the cause of

**CULPABLE HOMICIDE**—*continued.*

the accident was set forth, were not covered either by the major proposition or by previous allegations in the minor, *sustained*. Amendment of the libel, by striking out the irrelevant words, not being consented to by the panel's counsel, the diet deserted *pro loco et tempore*. *William Dudley*, High Court, Feb. 15, 1864, p. 468.

**CULPABLE AND FURIOUS DRIVING.** See **CULPABLE HOMICIDE**, 2, 5.

**CULPABLE NEGLIGENCE OF DUTY, &c.**

A charge of Culpable Neglect of Duty, 'whereby any of the ' lieges are put to danger of their lives and persons,'—held irrelevant. *Thomas Simpson*, Ayr, April 8, 1864, p. 490.

See **CULPABLE HOMICIDE**, 2.

**DAY POACHING.** See **STATUTE 2D AND 3D WILL. IV. c. 68.**

**DEAF AND DUMB.** See **PANEL.**

**DEAF AND DUMB WITNESS.** See **RAPE.**

**DECLARATION.**

Objection to admission of a panel's declaration—(1.) That the husband of the panel had been examined by the Sheriff-substitute and Procurator-fiscal before she emitted her first declaration, and at a time when the Sheriff and Fiscal had no reason to suspect that the husband was in any way connected with the crime,—and that his declaration had been taken as a precoognition by which to cross-examine the panel; (2.) That the three declarations taken from the panel were not proper declarations or voluntary statements but a series of answers to questions put by the Fiscal as to a witness; (3.) That the examination of the panel had been oppressive in respect of the length of the declarations and the time occupied in the examination; and, (4.) That the panel was subjected to unfair treatment under examination, in respect, as appeared from the second declaration, she was examined about certain articles then in the possession of the Fiscal, which were not shown to her till after the examination with reference to them had been concluded, and which had been done for the purpose of entrapping her into falsehood,—*repelled*. *Jessie M'Lauchlan*, Glasgow, Sept. 17, 1862, p. 220, and *Appendix*.

See **MURDER**, 2. **THEFT**, 1.

**DECREE.** See **APPEAL**, 4, 7, 10, 14.

**DIET OF TRIAL.** See **JURISDICTION.**

**DILIGENCE.** See **APPEAL**, 4.

**DOMICILE.**

Held, on a motion for forfeiture of a bail-bond, that citation of the accused at a conventional domicile specified in the bail-bond was sufficient, although the cautioner, who opposed the

DOMICILE—*continued.*

motion, alleged and offered to prove that at the date of the citation, and for more than forty days prior thereto, the accused was resident furth of Scotland. *Charles Crocket*, Perth, Sept. 28, 1864, p. 556.

## EMBEZZLEMENT.

A panel was charged with embezzling or stealing funds, the property of 'The Grassmarket Male and Female Yearly Society,' or of 'the members thereof,' of which he was treasurer.—*Objection repelled*, that it was not sufficiently or relevantly stated who the owners of the property were, because the society was not registered, and had no *persona standi*, and the members were not named individually. *Smith v. Lothian*, High Court, March 21, 1862, p. 170.

## EVIDENCE.

1. In a trial of a woman for Child-murder, it was proposed, on the part of the Crown, to ask a woman, in whose charge the prisoner had been left for a short time by the policeman who had the prisoner in custody, what the prisoner had said to her, in reference to the alleged murder, in answer to a question put to the woman—Circumstances in which the question was *disallowed*. *May Grant*, Perth, April 18, 1862, p. 183.
2. Under an indictment, charging the panel with—(1.) wilful fire-raising; and (2.) wilfully setting fire to goods, his own property, with the felonious intent to defraud an insurance company by recovering the amount of insurance above their value, on the false pretence that the articles destroyed were really of the value for which they were insured, counsel for the panel objected to evidence being led to prove the removal of certain articles from the premises before the fire, as being an attempt to prove a different crime from that libelled: *Objection repelled*. *William M'Creadie*, Ayr, October 2, 1862, p. 214.
3. *Held*, incompetent to recall a witness who had been examined for re-examination by the Crown, to answer a question in connection with a statement by a subsequent witness, in respect the subject-matter of the question was admitted by the Advocate-Depute to have been in his precognition. *James Wilson and others*, Glasgow, December 28, 1862, p. 255.
4. A Roman Catholic Priest was sentenced by a Justice of Peace Court, to be imprisoned for thirty days for contempt of Court, in so far as he had refused to answer a particular question put to him in the course of examination as a witness, on the ground, that answering it would lead to a violation of his duty, by his disclosing information given to him as a clergyman by a penitent.—*Held*, in a suspension, that the witness was bound to answer the question, because whether communi-

**EVIDENCE—continued.**

ations made by penitents to clergymen were privileged or not—a point which the Court abstained from deciding—the question put to the suspender did not relate to any such communication, but referred merely to matters of fact within his knowledge. *M'Laughlin v. Douglas and Kidston*, High Court, January 17, 1863, p. 273.

See ASSAULT. CIVIL AND CRIMINAL. FORGERY, 1. RAPE. WILFUL FIRE-RAISING.

**EVIDENCE, AUTHENTICATION OF.** See PERJURY, 2.

**EXPENSES.**

Expenses of procedure in the Inferior Court refused as against the Procurator-fiscal, the sentence complained of having been moved for by him in deference to the opinion of the Sheriff-Substitute who tried the case. *Gray v. Mackenzie*, High Court, February 24, 1862, p. 166.

**EXPENSES—IMPRISONMENT IN DEFAULT OF PAYMENT.** See SUSPENSION, 6, 7.

**EXTRACT CONVICTION (ENGLISH).** See THEFT, 1.

**FABRICATION OF FALSE ACCOUNTS.**

An indictment charged, *inter alia*, 'the wicked and felonious fabrication of any false account for the purpose of using the same with intent to defraud; as also the wicked and felonious fabrication of any false account or document purporting to be a receipt or discharged account, for the purpose of using the same with intent to defraud; as also the wickedly and feloniously using and uttering as true any false and fabricated account, knowing the same to be false and fabricated, with intent to defraud; as also the wickedly and feloniously using and uttering as true any false and fabricated account or document, purporting to be a receipt or discharged account, knowing the same to be false and fabricated, with intent to defraud.' Objection to the relevancy of the above charges, that they did not set forth crimes cognisable by law, *sustained*. *Michael Hinchy*, Perth, Sept. 30, 1864, p. 561.

**FALSEHOOD AND FRAUD.**

Objections to the Relevancy of an indictment charging 'Falsehood and fraud; as also fabricating and using false writings; as also forgery; as also using and uttering a forged bill of exchange or other writing,'—repelled. *Reuben Brooks and Frederick William Thomas*, Glasgow, Dec. 31, 1861, p. 132.

See THEFT 1.

**FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.** See FORGERY.

**FINE.** See SUSPENSION, 13.



## FORGERY.

1. Objection to the Specification of the uttering in a charge of forgery—repelled. (2.) A witness allowed to refresh his memory by reference to a written document which had been in his possession uninterruptedly since the occurrence in question. (3.) Where, in a charge of forgery, a special defence had been given in for the panel, setting forth malice on the part of the principal witness—Question, how far back proof of such malice could competently be carried, *George Wilson, Jr.*, Aberdeen, May 1, 1861, p. 42.
2. Objection to the statement of the *locus* in a charge of the Uttering of certain Forged Bills of Exchange, as being at or near the Post-Office at Dundee, 'or at or near some other Post-Office in or near Dundee, or in the shire of Forfar, or in Scotland, to the prosecutor unknown—repelled. (2.) Objection to the admissibility of certain productions in the inventory, reserved until they were tendered in evidence. (3.) A panel who pleaded guilty of Uttering the Forged Bills of Exchange sentenced to eight years' penal servitude. *James Fairweather*, High Court, Dec. 2, 1861, p. 119.
3. Terms of an indictment which held irrelevant and insufficient to sustain a cumulative charge of forgery and falsehood, fraud, and wilful imposition. *William Cowan*, Ayr, October 1, 1862. p. 213.
4. Objection to the relevancy of an indictment charging Forgery, as also the wickedly and feloniously using and uttering as genuine any bond or other obligatory writing—that the document set forth in the minor was not an obligatory writing according to the law of Scotland—repelled. *Andrew M'Donald*, High Court, June 1. 1863, p. 414.
5. Question, whether the using and uttering as genuine a forged letter or other document, not being an obligatory writing, is a relevant charge? (2.) Circumstances in which the Court allowed a libel to be amended, by deleting certain words in the major proposition. *Henry Inrie*, Perth, Sept. 18. 1864, p. 436.

See also FALSEHOOD AND FRAUD.

FOREIGN. See BASE COIN, 2.

FRAUDULENT BANKRUPTCY. See FRAUDULENT CONCEALMENT OF PROPERTY.

FRAUDULENT CONCEALMENT OF PROPERTY.

*Held*,—(1.) That it is not necessary in the minor of an indictment charging fraudulent concealment of property by a Bankrupt, to set forth the names of creditors who have been defrauded, if the indictment set forth that a trustee had been appointed on the bankrupt's estate. (2.) That it is not necessary

**FRAUDULENT CONCEALMENT OF PROPERTY—continued.**

to constitute a relevant charge of perjury that the facts, which the prosecutor sets forth and intends to prove against the panel, should be a direct logical contradiction of the bankrupt's deposition upon oath. (3.) A panel found guilty under the above charge sentenced to twelve months' imprisonment. *James Henderson*, Perth, September 30, 1862, p. 208.

2. Objections sustained to the relevancy of an indictment charging, (1.) Fraudulent concealment of property by a person intending to apply for sequestration; (2.) Perjury, in respect that the bankrupt did not, in the statutory oath, make a full disclosure of his affairs, it not being set forth that this defect referred to the state of his affairs at the time of emitting the oath; (3.) Fraudulent bankruptcy committed by the panels 'while acting 'in the premises,' as libelled. *William and Catherine Inglis*, Glasgow, April 23, 1863, p. 387.

3. Terms of an Indictment charging fraudulent concealment or putting away for the purpose of defrauding creditors of the property of a person on the eve of bankruptcy, or in contemplation of insolvency or bankruptcy—held irrelevant. *William and Catherine Inglis*, High Court, June 29. 1863, p. 419.

**FUGITATION AND OUTLAWRY.**

Circumstances in which a petition for reponing against a sentence of Fugitation was granted *simpliciter*, notwithstanding the opposition of the public prosecutor. *Michael Hinchy*, High Court, July 18 and 20, 1864, p. 559.

**GUILTY KNOWLEDGE.** See **THEFT**.

**HABITE AND REPUTE A THIEF.** See **STOUTHRIEF**. **THEFT**.

**HOUSEBREAKING.**

Circumstances in which an aggravation of Housebreaking was, under direction of the Presiding Judge, found not proven. *John Anderson*, High Court, November 17, 1862, p. 235.

See **STOUTHRIEF**.

**HOUSEBREAKING WITH INTENT TO STEAL.**

An indictment charged the wickedly and feloniously breaking a pane of glass in the window of a shop or other premises for the purpose of entering and stealing therefrom. The minor set forth that the panels after breaking a pane of the window of a pawn-office, 'did endeavour to force or push up the shutter 'on the outside of said window.'—Objection sustained that the *species facti* set forth in the minor amounted only to attempt at housebreaking. *Thomas Sinclair and James M'Lymont*, Glasgow, April 21. 1864, p. 499.

**INDECENT EXPOSURE OF THE PERSON.** See **SUSPENSION**, 26. **INDICTMENT**.

In an indictment for the murder of a child, the alternative, 'or

INDICTMENT—*continued.*

'did, in some other way to the prosecutor unknown, maltreat 'the said child,' struck out on the motion of the prosecutor. *Mary Scully or Scolly*, High Court, June 22, 1862, p. 195.

See APPEAL, ATTEMPT TO BREAK PRISON. ATTEMPT TO MURDER BY POISON. BASE COIN. CULPABLE HOMICIDE. CULPABLE NEGLECT OF DUTY. FABRICATION OF FALSE ACCOUNTS. FORGERY. FRAUDULENT CONCEALMENT OF PROPERTY. HOUSEBREAKING WITH INTENT TO STEAL. NIGHT-POACHING. THEFT. THREATENING LETTERS. TIME—LATITUDE OF. WILFUL FIRE-RAISING.

## INSANITY.

1. Procedure to be followed in a criminal case when medical witnesses, who have been permitted to remain in Court to hear the evidence on a plea of insanity, desire questions to be put to the other witnesses in the course of examination. *Robert Pattison*, Glasgow, Sept. 26, 1861, p. 94.
2. Circumstances in which a plea of insanity in bar of trial was held to be established by the evidence. *Thomas Arnot*, High Court, June 6, 1864, p. 529.

See MURDER, 2, 4, 5.

INSTANCE. See APPEAL.

## JURISDICTION.

Two panels were indicted for a Circuit Court to be holden at Glasgow 'in the month of September.' They were cited for the 27th of that month, and the diets were afterwards continued from day to day till the 2d of October, when they were tried and found guilty. Objection to sentence passing, that the prescribed time for holding the Court had expired—repelled, *James M'Kay and John Broadly*, Glasgow, October 2, 1861. p. 97.

See also APPEAL. SUSPENSION.

JUROR, CHALLENGE OF. See SUSPENSION, 21.

## JUSTICE OF THE PEACE.

REASONS OF SUSPENSION, (1.) that the warrant of citation was signed by one Justice only; (2.) that one of three justices who signed a minute of adjournment in the cause was disqualified because he had not taken the oath of office, *repelled*, on the ground, (1.) that a warrant of citation might competently be signed by one Justice; and, (2.) that two Justices were a quorum under the Act, and the presence of a disqualified Justice (there being a quorum without him) could not invalidate the proceedings. *M'Creadie v. Murray*, High Court, March 22, 1862, p. 176.

See also APPEAL, 3, 5, 6, 11, 12. OATH. SUSPENSION.

KIRK. See SUSPENSION, 4.

**LANDLORD AND TENANT.** See **SUSPENSION**, 2.

**LIBEL, AMENDMENT OF.**

See **FORGERY**, 2. **SUSPENSION**.

**LIBERATION.**

A prisoner committed on a charge of Forgery ran his letters, and was brought up for trial on criminal letters 146 days afterwards —Plea, that under the Act 1701, c. 6, the Public Prosecutor was bound to complete the trial of a prisoner within 140 days after he had run his letters, and that therefore the prisoner was entitled to liberation, *repelled*, on the ground, that while the Act 1701 entitled a prisoner to demand liberation within a certain time after he had run his letters if he was not served with criminal letters, that Act did not in any way limit the Public Prosecutor as to the time when he might serve criminal letters. *James Molyson*, Perth, April 18, 1862, p. 180.

**LOCUS.**

Objection taken to the specification of *locus* in a charge of murder —sustained. *Daniel Fraser*, Glasgow, Sept. 1861, p. 99.

See **FORGERY**, 2. **MURDER**.

**LUNATIC.** See **ASSAULT**.

**MALICE.** See **FORGERY**, 1. **SUSPENSION**, 4.

**MALICIOUS MISCHIEF.**

A Complaint in the Sheriff Court charged wilful and malicious mischief, as also assault, or one or other of these crimes. The Sheriff-substitute found 'the complaint proved on the evidence.' On appeal it was contended that this finding was bad from uncertainty. The Court, while in the particular circumstances of the case they set aside the judgment, were of opinion that it was not incorrect in point of form. *Speid v. Whyte*, Perth, Sept. 30, 1864, p. 584.

**MASTER AND SERVANT.** See **SUSPENSION**, 12, 19, 23, 25.

**MEDICAL WITNESS.**

The provision in the Medical Practitioners' Act, (21st and 22d Vict. c. 90), that no medical certificate required by any Act shall be valid unless the person signing it be registered under the Act, does not apply to a medical report proposed to be read in and proved in a criminal trial in the Court of Justiciary. *Bernard Macnamara*, High Court, Dec 16, 1861, p. 131.

See also **INSANITY**.

**MINES, INSPECTION OF.** See **SUSPENSION**, 8.

**MINOR PROPOSITION.** See **BASE AND COUNTERFEIT COIN**.

**MOBBING AND RIOTING.**

1. Objection to the relevancy of an indictment charging Mobbing and Rioting, as also Assault,—*repelled*. (2.) Four panels charged with mobbing and rioting on the occasion of a county

MOBBING AND RIOTING—*continued.*

election, but acquitted. *James Farquhar and others*, High Court, April 30, 1861, p. 28.

2. An Indictment charged the panels with Mobbing and Rioting, as also, Breach of the Peace, and with one or other of these crimes, actors or art and part. The Jury found the panels not guilty of Mobbing and Rioting, but guilty of Breach of the Peace—Objection, that no sentence could follow on the verdict in respect that there was no charge of breach of peace against the panels individually, apart from the charge of mobbing and rioting—repelled, on the grounds, (1.) That it came late, being excluded by the interlocutor of relevancy; and, (2.) That the objection itself was bad, even if it had not been so excluded. *Michael Currie and others*, High Court, Dec. 19, 1864, p. 580.

## MODUS.

1. Objection to the description of the *modus operandi* in a charge of Child-Murder, repelled. *Christian Craig*, Inverness, May 1, 1862, p. 189.
2. In an indictment for the murder of a child, the alternative, 'or did, in some other way to the prosecutor unknown, maltreat the said child,' struck out on the motion of the prosecutor. *Mary Scully or Scolly*, High Court, June 23, 1862, p. 195.
3. The alternative words 'or some other way to the prosecutor unknown,' in the description of the *modus* in a charge of theft by housebreaking, objected to, but sustained under the circumstances. *Alexander Glennie*, High Court, June 27, 1864, p. 536.

## MOTION FOR DELAY OF TRIAL. See THEFT, 1.

## MURDER.

1. In the trial of a boatswain and a marine of one of her Majesty's ships, for the crime of murder or culpable homicide, in having fired on a party of trawlers, and killed one of them, the Lord Justice-General directed the Jury that the marine was bound to obey the orders of the boatswain, unless his orders were flagrantly illegal; and that if the Jury were of opinion that the prisoners had acted according to the usage of the naval service, and not recklessly, they were entitled to an acquittal. The Jury returned a verdict of Not Guilty. *Robert Hawton and William George Parker*, High Court, July 15, 1861, p. 58.
2. In a trial for murder, where the panel pleaded insanity at the time the act was committed, medical witnesses were, on the motion of the counsel for the panel, allowed to remain in Court while the general evidence was being led, the counsel for the prosecution not objecting to the course. 2. Circumstance in which it was held that a Lieutenant of Police

**MURDER—continued.**

- and a Police Surgeon were justified in putting certain questions to a prisoner supposed to be insane, who had been brought to the office on a charge of murder, but who had not as yet emitted a judicial declaration: held also that the answers to these questions were admissible in evidence. 3. Objection was taken to the admissibility of a declaration, on the ground that when it was emitted the panel was not in his sound and sober senses, and proof was offered in support of the objection, which was stated to be generally the same evidence as was to be adduced in support of a special defence of insanity. The declaration admitted in the meantime, reserving to the Court, should they see cause, to direct the jury that it was not evidence against the panel in respect of his condition when it was emitted. 4. A prisoner's declaration is an element in evidence in the question of his sanity or insanity. 5. Statement of the law as to insanity when pleaded as a defence to a criminal charge. 6. A panel convicted of the crime of murder notwithstanding alleged insanity at the time when the act was committed. *Alexander Milne*, High Court, Feb. 9, 10, 11, 1863, p. 301.
3. A woman charged with the Murder of her new-born child, pleaded guilty of Culpable Homicide—Sentence, fifteen years' penal servitude. *Elizabeth Walker*, High Court, March 7. 1864, p. 484.
4. Circumstances in which a charge of Murder, a plea of insanity in bar of trial was sustained on evidence led. *Joannis Manolatos*, High Court, April 6. 1864, p. 485.
5. A panel convicted of the crime of Murder notwithstanding a defence of insanity at the time the act was committed. (2.) Circumstances in which objection repelled to the admissibility in evidence of statements made to a police-officer by the panel after he was in custody. *George Bryce*, High Court, May 30 and 31. 1864, p. 506. See INSANITY, 2.

**NIGHT-POACHING.**

1. *Observed* by Lord Deas in charging the Jury in a prosecution for breach of the Night-Poaching Act, 9th Geo. IV. c. 99, (1.) That, where several persons are out in company for the purpose of taking or destroying game, and only one of them is armed, the rest who are unarmed are liable to be convicted under the Act; (2.) That in a case of poaching, previous convictions are relevant articles of evidence for the Jury, in determining whether the purpose for which a panel unlawfully entered land was to take or destroy game. *Andrew Granger*, Perth, Sept. 17. 1864, p. 432.
2. *Held* (1.) that the 1st section of the Night-Poaching Act

NIGHT-POACHING—*continued*

(9th Geo. IV. c. 69), which directs the punishment of any person who shall by night unlawfully take or destroy game or rabbits, or shall by night unlawfully enter or be in any land for the purpose of taking or destroying game, does not contemplate two separate crimes, but only two different modes of committing a single crime; and (2.) that the Court of Justiciary has no jurisdiction under the above section, except in the case of a third offence. (3.) Observations by the Lord Justice-General as to the proper mode of libelling previous convictions under this Statute. *George Duncan*, High Court, Feb. 29. 1864, p. 474.

3. Objection to the relevancy of a charge of night-poaching, under the Act 9th Geo. IV. c. 69, and supplementary Act 7th and 8th Vict. c. 29, in respect that the provisions of the latter Act did not extend or apply to the section of the former Act libelled on, *sustained*. *John Burns and Others*, Perth, April 23. 1863, p. 438.

## OATH.

*Opinion*, that the Justices, who, on a witness objecting to take an oath to tell the whole truth, had administered an oath 'to tell the truth, and that whatever he said should be truth,' were wrong in administering any oath except the ordinary one; but that, nevertheless, the witness, who thought the terms of the oath were such as to liberate him from answering a particular question, was bound to answer it, on the ground that the obligation of a witness to give evidence was not dependent on the terms of the oath administered. *M'Laughlin v. Douglas and Kidston*, High Court, January 17, 1863, p. 273.

OPPRESSION. See SUSPENSION, 5.

## PANEL.

Procedure adopted where a panel was deaf and dumb. *Donald Turner*, Glasgow, Sept. 25, 1861, p. 93.

PANEL, DESIGNATION OF. See THEFT, 6.

PENALTY. See SUSPENSION.

## PERJURY.

1. *Held*, That it is not necessary to constitute a relevant charge of perjury, that the facts which the prosecutor sets forth and intends to prove against the panel, should be a direct logical contradiction of the bankrupt's deposition upon oath. *James Henderson*, Perth, September 30, 1862, p. 208.
2. Circumstances in which the jury acquitted a panel charged with perjury by giving false evidence in his examination on oath in the sequestration of a bankrupt, the Sheriff-Substitute who took the examination having been absent during part of the

**PERJURY**—*continued.*

panel's evidence. *William Hastie*, Glasgow, April 23, 1863, p. 389.

See **FRAUDULENT CONCEALMENT OF PROPERTY. SUSPENSION, 7. PETITION.**

A bankrupt was by warrant of the Sheriff-Substitute committed to the prison of Elgin, in respect of his refusal to answer certain questions under the Bankruptcy Act. Pending this imprisonment he was sentenced by the Circuit Court at Inverness to fifteen months' imprisonment in the General Prison at Perth. On the expiry of the latter sentence the Court of Justiciary, on the petition of the trustee, granted warrant to carry back the bankrupt to the prison of Elgin. *Forsyth v. Thompson*, High Court, July 17. 1863, p. 425.

**PLAGIUM.**

(1.) The crime of plagium may be committed wherever the object of it is a child under puberty ; (2.) An indictment charged alternatively with plagium, ' the wicked and felonious abduction from its parents of a female child under the age of ' puberty,' said to have been effected ' by seducing, enticing, ' and inveigling' her to leave her parents, in whose custody she was, without their knowledge or consent. The Court having expressed doubts as to the relevancy of such a charge, it was withdrawn by the prosecutor ; (3.) It is plagium to entice and take away a girl, ten years old, from the custody and without the consent of her parents, even though the child go willingly, and the purpose of the person taking her is to employ her as a servant, or although the person taking her may have no intention of appropriating her, but means to restore her to her parents in a day or two ; (4.) In plagium it is immaterial whether the child said to have been stolen have been taken away *lucri faciendi causâ* or not ; (5.) A panel convicted of the theft of a child sentenced to six months' imprisonment.

*Mary Millar or Oates*, High Court, July 22, 1861, p. 74.

**PLEA IN BAR OF TRIAL.** See **INSANITY, 2.**

**POLICE COURT.** See **SUSPENSION, 5, 6, 7, 13, 15.**

**POST-OFFICE OFFENCES.** See **STATUTE 1ST VICT. c. 36.**

**PREVIOUS CONVICTION.** See **BASE COIN.**

**PROCEDURE.** See **APPEAL TO CIRCUIT COURT. SUSPENSION. SHERIFF-COURT.**

**PROCURATOR-FISCAL.** See **APPEAL. EXPENSES. SUSPENSION, 7, 8.**

**PRODUCTION.** See **FORGERY.**

**PROPERTY OF STOLEN OR EMBEZZLED ARTICLES.** See **EMBEZZLEMENT.**



PROSECUTOR. See APPEAL. LIBERATION.

QUARTER SESSIONS. See SUSPENSION.

**RAPE.**

1. In a charge of rape, although the unchaste character of the woman said to have been ravished is no matter of defence, due notice must be given to the prosecutor if the panel intends to lead evidence of the woman's unchastity. (2.) It is incompetent to lead evidence in respect to character, other than at or about the time of the alleged offence. (3.) It is incompetent to lead evidence in proof of character on points collateral to the issue, and not forming part of the *res gesta*. *James Reid and others*, High Court, Dec. 9, 1861, p. 124.
2. In a trial for rape, a deaf and dumb witness who was uneducated, and there was reason to believe had no knowledge of a Supreme Being, examined on declaration. *Edward Rice*, Glasgow, April 21, 1864, p. 493.

RAILWAY. See APPEAL, 1.

RELEVANCY. See BASE AND COUNTERFEIT COIN. INDECENT EXPOSURE OF THE PERSON. FABRICATING FALSE ACCOUNTS.

PLAGIUM. STOUTHRIEF. SUSPENSION. TIME—LATITUDE OF.

REPONING. See FUGITATION AND OUTLAWRY.

RES JUDICATA. See Appeal, 10.

RESET OF THEFT. See SUSPENSION.

**RETURNING FROM PENAL SERVITUDE.**

- (1.) A prosecution for returning from penal servitude, libelled on the enactments 5th Geo. IV. c. 84, sects 2 and 22; 4th and 5th Will. IV. c. 67; and 20th and 21st Vict. c. 3, sect. 2, which makes the punishment for the crime transportation for life,—*Held*, that the Court had power to impose a short term of penal servitude, although the enactments 9th and 10th Vict. c. 24, sect. 1, and 20th and 21st Vict. c. 3, sect. 2, empowering them to do so, were not libelled. (2.) Circumstances in which the Court imposed a sentence of one month's imprisonment and three years' penal servitude, for returning from penal servitude. *John Nellus or Neillus*, High Court, May 20, 1861, p. 51.

SALMON FISHERIES ACT 1862. See APPEAL, 5, 6.

**SENTENCE.**

Three panels convicted of breach of the peace, sentenced to nine months' imprisonment. *Michael Currie and others*, High Court, Dec. 19, 1864, p. 580.

See ASSAULT. FORGERY. FRAUDULENT CONCEALMENT OF PROPERTY. WICKEDLY AND FELONIOUSLY HAVING CARNAL CONNECTION OF A WOMAN WHEN ASLEEP.

SEQUESTRATION. See PERJURY.

**SEPARATION OF TRIALS.**

In an indictment charging Murder against two panels, and Con-

**SEPARATION OF TRIAL—continued.**

sealment of Pregnancy alternatively against one of them—  
*Held* competent, on the motion of the prisoner's counsel, to  
separate the trials to the extent of dealing with each charge  
separately. *Elizabeth Duncan and Ann Brechin*, Perth, Sept.  
29, 1862, p. 206.

See **SUSPENSION**, 5. **THEFT**, 1.

**SHERIFF.** See **SUSPENSION**.

**SHERIFF-CLERK.** See **APPEAL**.

**SIST.** See **APPEAL**, 9.

**SMALL DEBT DECREE.** See **APPEAL**, 13.

**SPECIAL DEFENCE.** See **MURDER**.

**STATUTE 1701, c. 6.**

Certain charges in an indictment, having been found irrelevant,  
the Court, on the motion of the Public Prosecutor, deserted the  
diet *pro loco et tempore*. The Public Prosecutor then presented  
an application to the Court for a warrant to apprehend and de-  
tain the panel (who was running his letters) until criminal  
letters were prepared. The Court refused to write upon the  
petition, and the panel was liberated. *Michael Hinchy*, Perth,  
Sept. 30, 1864, p. 561.

See **LIBERATION**.

—— 44TH GEO. III. c. 45, (Solway Fishing Act.) See **APPEAL**, 3.

—— 4TH GEO. IV. c. 34. (Master and Servant.) See **SUSPENSION**,  
12, 19, 28.

—— 5TH GEO. IV. c. 84. See **RETURNING FROM PENAL SERVITUDE**.

—— 9TH GEO. IV. c. 84. See **RETURNING FROM PENAL SER-  
VITUDE**.

—— 2D WILL. IV. c. 34. See **BASE AND COUNTERFEIT COIN**.

—— 2D AND 3D WILL. IV. c. 67. See **RETURNING FROM PENAL  
SERVITUDE**.

—— 5TH AND 6TH WILL. IV. c. 63. (Weights and Measures.)  
See **SUSPENSION**, 11.

—— 1ST VICT. c. 86, SECTS. 27, 28. (Post Office.)

*Held* competent to libel on a contravention of the 27th section of  
the statute, charging the theft out of a post letter, in addition to a  
contravention of the 28th section, charging the stealing a post  
letter from a a post-letter bag. *Alexander M'Kay*, Sept. 24,  
1861, p. 88.

—— 1ST VICT. c. 41, (Small Debt Act.) See **APPEAL**.

—— 7TH AND 8TH VICT. c. 35. (Salmon Fishing.) See **SUS-  
PENSION**.

—— 8TH AND 9TH VICT. c. 26. (Trout Fishing.)

An agricultural tenant has no right to fish for trout or other  
fresh water fish in a stream on his farm; and if he do so without  
permission, he is liable to the penalties of contravening the

STATUTE—*continued.*

- Act 8th and 9th Vict. c. 25. *Duke of Richmond v. Dempster*, High Court, Jan. 14, 1861.
- 9TH AND 10TH VICT. c. 24. See RETURNING FROM PENAL SERVITUDE.
- 11TH AND 12TH VICT. c. 113. (Edinburgh Police Act.) See SUSPENSION, 5, 6.
- 13TH AND 14TH VICT. c. 33. (General Police Act.) See SUSPENSION, 13.
- 16TH VICT. c. 20 (Evidence). See APPEAL.
- 16TH AND 17TH VICT. c. 80, (Sheriff Courts). See SUSPENSION, 10, 21.
- 20TH AND 21ST VICT. c. 3. See RETURNING FROM PENAL SERVITUDE.
- 21ST AND 22D VICT. c. 90, (Medical Practitioners.) See MEDICAL WITNESS.
- 23D AND 24TH VICT. c. 151 (Regulation and Inspection of Mines.) See SUSPENSION, 8.
- 24TH AND 25TH VICT. c. 99. See BASE AND COUNTERFEIT COIN.
- 25TH AND 26TH VICT. c. 69. (Salmon Fisheries Scotland.) See APPEAL, 5, 6.
- 25TH AND 26TH VICT. c. 97 (Salmon Fisheries Act). See APPEAL, 1, 2.
- 25TH AND 26TH VIC. c. 114 (Poaching). See SUSPENSION, 17, 22.
- STATUTES, LIBELLING OF. See RETURNING FROM PENAL SERVITUDE.

STATUTORY OATH IN SEQUESTRATION. See FRAUDULENT CONCEALMENT OF PROPERTY.

## STOUTHRIEF.

1. Objections to an indictment charging Stouthrief, especially when committed by means of housebreaking, and by a person who has been previously convicted of theft, as also assault—repelled. *William Thomson and George Bryce*, Glasgow, April 23, 1861, p. 47; and note.
2. Opinion of Lord Neaves that 'habite and repute,' and previous conviction of theft cannot be relevantly charged as aggravations of a charge of stouthrief. *John Bryson and others*, Glasgow, April 22, 1863, p. 384.

## SUSPENSION.

1. Under the Day-Poaching Act, 2d and 3d Will. c. 68, no formal copy of citation is required, if it be proved that a copy of the deliverance of the Justices ordering the party to appear at the time and place specified has been duly served upon him. *Harcourt and Priestly v. Low*, High Court, Jan. 14, 1861, p. 1.

SUSPENSION—*continued.*

2. An agricultural tenant has no right to fish with net for trout or other fresh-water fish in a stream on his farm; and if he do so without permission, he is liable to the penalties of contravening the Act 8th and 9th Vict. c. 26. *Duke of Richmond v. Dempster*, High Court, Jan. 14, 1861, p. 10.
3. A suspension of a summary conviction under the Statutes 9th Geo. IV. c. 39, and 7th and 8th Vict. c. 35, refused, in respect that the suspender had neglected to avail himself of the remedy pointed out by the Statutes, viz., appeal to the next Circuit Court of Justiciary—the Court holding that the objections to the conviction were such as could competently be stated only at the Circuit Court. *M'Phail v. Campbell*, High Court, March 18, 1861, p. 18.
4. A libel *sustained* as relevant which charged a breach of the peace, especially when committed wilfully and maliciously, on the Sabbath-day, in a church, in presence of the minister and congregation, during divine worship; as also the wickedly, wilfully, and maliciously disturbing and annoying a minister and congregation assembled in church during divine worship, on the Sabbath-day. 2. Conviction *sustained*, which followed on a verdict of the Jury finding the panel guilty of breach of the peace as libelled, but malice not proven. *Dougal v. Dykes*, High Court, Nov. 1861, p. 101.
5. Certain persons were charged, in the Police Court of Edinburgh, under the Edinburgh Police Act of 1848, with breach of the peace and disorderly conduct, and two of them with suffering disorderly conduct at the same time and place. The charge of breach of the peace having been found not proved, and the persons charged with suffering disorderly conduct having been convicted, a suspension, at their instance, on the ground that the riot not having been proved, they could not be legally convicted of suffering it, *refused*. 2. Refusal to separate the trials of several panels is not a relevant ground of suspension, unless it amounts to oppression. *Law and Turner v. Linton*, High Court, Nov. 18, 1861, p. 106.
6. A complaint in a Police Court, libelling that an accused had received goods knowing them to have been stolen, *held* (in a suspension) irrelevant, because it contained no substantive averment that the goods had been stolen. *Donaldson v. Buchan*, High Court, Nov. 18, 1861, p. 109.
7. A Police Judge convicted a person of an offence against the Act for Regulation of Public-houses, on the ground that the offence was proved by A, and two other persons, 'credible witnesses.' He also sentenced A to imprisonment for prevarication during the trial. Suspension by A, on the ground that

SUSPENSION—*continued.*

she could not be guilty of prevarication if she were a credible witness.—*repelled.* *Question,* Whether the Procurator-fiscal in the Police Court, who was also complainer in the trial for contravention of the Public House Act, was the proper respondent in such a suspension? or, Whether the Judge should have been called as respondent? *Nicholson v. Linton*, High Court, Nov. 18, 1861, p. 115.

8. A complaint by a Procurator-fiscal to recover statutory penalties for violation by the owner of a coal-pit of one of the general rules directed by the Mines Regulation and Inspection Act, to be observed in coal and ironstone-mines, is a civil proceeding; and therefore the Justiciary Court has no jurisdiction to entertain a suspension of a judgment of a Sheriff pronounced in such a complaint. (2.) *Question,* Whether a complaint to recover penalties for violation of the special rules established under the Act be civil or criminal? *Macdonald v. Young*, High Court, January 20, 1862, p. 154.
9. An Appeal to the next Circuit Court taken in open Court, under the Act 20th Geo. III. c. 43, in which caution had been found, but in which reasons of appeal had not been lodged, passed from, and the proceedings brought under review of the High Court by suspension. *Gray v. Mackenzie*, High Court, Feb. 25, 1862, p. 166.
10. The relevancy of a libel in the Sheriff Court must be considered at the first diet, and therefore where an interlocutor sustaining the relevancy has been pronounced at the first diet, it is incompetent to state objections to the relevancy of the second diet. *Smith v. Lothian*, High Court, March 21, 1862, p. 170.
11. *Held,* that a conviction under the Statute 5th and 6th Will. IV. c. 63, for having Light Weights in a place where goods were kept for sale was a criminal proceeding, and might be competently suspended by the High Court of Justiciary. *M'Creadie v. Murray*. High Court, March 22, 1862, p. 176.
12. A farm-servant convicted in a Justice of the Peace Court of having deserted his master's service, was sentenced to imprisonment, under the Act 4th Geo. IV. c. 34. The sentence suspended as being disconform to the statute, in respect that hard labour had not also been imposed. *Ferguson v. Thow*, High Court, June 30, 1862, p. 196.
13. Suspension of a Police Court Sentence, imposing a fine for an assault, and decerning that, failing 'immediate payment' thereof, the offender should be imprisoned for six days, was sought on the ground that the sentence was in violation of sections 337 and 361 of the General Police Act, which only authorize the Magistrates to grant warrant for imprisonment

SUSPENSION—*continued.*

'until such penalty be paid.'—*Held*, That neither of these sections covered the case, but that the sentence was competent under section 345 of the Statute—*Suspension refused.* *Minty v. Symon*, High Court, June 30, 1862, p. 198.

14. Circumstances in which suspension of a conviction under the Day-Trespass Act was refused, and—*Held*, (1.) That the Justices in Quarter Sessions have no authority to award imprisonment as a means of enforcing payment of the expenses of an appeal from a sentence by the Justices in Petty Sessions. (2.) That the portion of the judgment of the Quarter Sessions containing such an award was separable from, and might be omitted from view, so as to leave the affirmance by the Quarter Sessions of the conviction by the Justices, and a conviction itself, to remain good. The award of imprisonment, however, set aside. *Snaddon v. Spence*, High Court, June 30, 1862, p. 200.
15. Circumstances in which a conviction under the General Police Act, for the crime of theft, was *suspended*, on the ground that the proceedings were oppressive. *Jamieson and others v. Mackay*, High Court, November 24, 1862, p. 246.
16. A conviction under the Night-Poaching Act suspended, on the ground, (1.) That the complaint was irrelevant, in respect the description of the *locus* was unintelligible and insufficient, having been set forth as being in two separate parishes; (2.) That the offence charged of entering or being on land for the purpose of destroying 'game or rabbits,' was not a relevant charge under the Statute, and that, after the panel had pleaded to the libel as originally framed, the libel could not be amended by the deletion of the words 'or rabbits,' which would have been a relevant charge. *Mitchell v. Campbell*, High Court, January 5, 1863, p. 257.
17. In a prosecution under the 2d Section of the Act 25th and 26th Vict. c. 114, which refers to section 11 of the previous Act, 2d and 3d Will. IV. c. 68, it is necessary to *charge the offence*, and without such charge made *de presenti* by the constable apprehending, in the statutory deposition upon oath, the Justice cannot competently issue a warrant of citation. Conviction on a complaint proceeding on a deposition where this had not been attended to—suspended. *Trainer v. Johnston*. High Court, January 5, 1863, p. 264.
18. In a prosecution before a Justice of Peace Court for breach of the Day-Trespass Act (2d and 3d Will. IV. c. 68), after the proof on both sides had been closed, the presiding Justice made *avizandum* with the cause, and appointed a day for pronouncing judgment. On that day the agent for the prosecution moved for leave to lead proof in replication, on the ground

SUSPENSION—*continued.*

that he had received no notice of the accused's defence of *alibi*. The motion was granted, and after the proof had been taken in replication, the Justice found the complaint proven, and convicted the accused.—*Held* that, looking to the time at which the proof in replication was granted, the proceeding was *incompetent*.—The conviction set aside accordingly. *Robertson v. Baroness Keith*, High Court, January 5, 1863, p. 268.

19. In a suspension of a conviction of a workman for deserting his master's service, in contravention of the Statute 4th Geo. IV. c. 34, on the ground of oppression, inasmuch as no time had been afforded to the suspender to lead proof or obtain the assistance of a law-agent, the Court refused an application for suspension on the ground that it was not sufficiently averred by the suspender that delay had been asked and refused, although at the bar that averment was made and proof of it was offered. *M'Lean v. Macfarlane*, High Court, March 9, 1863, p. 351.

20. Circumstance in which, where a suspender alleged that he had been convicted under the Day-Poaching Act, and had been fined, and where the conviction was not written out, the Court refused the suspension as incompetent, because there was no conviction. *Jupp v. Dunbar*, High Court. March 9, 1863, p. 355.

21. A Sheriff-Substitute has jurisdiction to try the offence of wicked, felonious, and fraudulent concealment or clandestinely putting away by a person whose estates have been sequestered, and who is undischarged, of property or effects which belonged to him prior to such sequestration, for the purpose of defrauding his creditors. 2. A peremptory challenge of a juryman in a criminal case must be stated when the name of the juryman is called, and therefore an objection to a sentence by a Sheriff-Substitute on the ground that he had refused to sustain such challenge after the name of the juryman had been entered in the sederunt book of the Court, but before the jury was sworn—*repelled*. In a suspension of a conviction for fraudulent concealment and putting away of property by a sequestered bankrupt and of perjury.—*Held* (1.) That the latitude assumed in stating the time was not too great. (2.) That it was not necessary to state in whose possession the goods were prior to their being put away. (3.) Certain inaccuracies in setting forth the statutory oath on which the charge of perjury was founded,—held immaterial. (4.) Amendments of the libel made by the Sheriff held competent. *Dawson v. M'Lennan*, High Court, April 2, 1863, p. 357.

22. A conviction by Justices of the Peace under the Act 25th

**SUSPENSION**—*continued.*

and 26th Vict. c. 114, which refers to the previous Act 2d and 3d Will. IV. c. 68, set aside, in respect that the warrant of citation did not proceed on the oath of a credible witness, in terms of the 11th section of the latter Act. *Logan v. Coupland*, High Court, Dec. 14. 1864, p. 453.

23. A workman was engaged, without an indenture, to serve for five years at gradually increasing wages. Having deserted the service during the currency of the third year of his engagement, he was convicted under the 3d section of the Act 4th Geo. IV., c. 34.—Conviction *suspended*, with expenses, on the ground that at the time when the desertion took place, the workman was under no binding obligation to remain in his employer's service. *Question*, Whether the conviction would have been good, if the desertion had taken place during the first year of the service? *Murray v. M'Gilchrist and Torrance*, High Court, Dec. 18. 1863, p. 461.
24. A panel was tried before a Sheriff and jury, on a libel charging him with two separate acts of theft by housebreaking. The jury returned a general verdict finding the panel 'guilty of 'theft by means of housebreaking;' and the Sheriff 'in respect of the foregoing verdict, finds the panel guilty as libelled: Therefore sentences and adjudges him,' &c. Sentence *suspended*, on the ground that it proceeded on an ambiguous verdict. *Graham v. Toderick*, High Court, May 21 1864, p. 504.
25. Circumstances in which a conviction under the Act 4th Geo. IV. c. 34, for desertion of service was set aside. *Young v. Scott*, High Court, July, 4, 1864, p. 541.
26. A complaint setting forth that certain parties had been guilty of 'the crime of indecent exposure of the person,' in so far as, 'at or near a part of the River South Esk situated opposite or 'near to Brechin Castle, they did wickedly and feloniously expose their persons in an indecent and unbecoming manner, 'and did take off their clothes and expose themselves on the 'banks of the said river in a state of nudity, to the annoyance 'of the lieges,'—Held irrelevant; and a conviction proceeding thereon, *suspended*. *M'Kensie v. White*, High Court, Nov. 14, 1864, p. 570.

See APPEAL.

**THEFT.**

1. Circumstances in which a motion, 1st, for separation of trials; and, 2d, for delay of the trial of one of the panels was refused.
2. A certificate or extract of a conviction of the crime of theft in an English Court is admissible in proof of an aggravation of previous conviction of theft.
3. *Objection* to the admission of a panel's declaration; that it did not set forth that the



THEFT—*continued.*

charge was explained to the panel, or that she was cautioned not to answer unless she chose—*repelled*. 4. The character of habits and repute a thief, *held* not to be established by proof that the panel had borne that character for a year. *Jane M'Pherson or Dempster and others*, High Court, Jan. 13, 1861, p. 143.

2. A panel was charged with falsehood, fraud, and wilful imposition, in so far as he made certain representations, and did, 'by means of these or other similar or false representation, deceive and impose upon,' certain persons. The minor proposition was objected to, and the Court ordered the word 'or' to be deleted from the libel. (2.) A panel is guilty of theft, who by means of false pretences, obtains possession of and appropriates the property of another in the custody of a third person. (3.) Circumstances in which, under an indictment charging falsehood, fraud and wilful imposition, or theft, the public prosecutor asked a verdict on the charge of theft only, the mode of imposition proved being different from that alleged. *Henry Hardinge*, High Court, March 2, 1863, p. 347.
3. A panel was charged with theft, in so far as, having received for temporary use from A. B. a shawl, the property, or in the lawful possession of A. B., the panel stole the shawl 'above libelled.' Objection that the crime charged was breach of trust not theft—*repelled*. (2.) Question, whether it was sufficient to charge the panel with the theft of the shawl 'above libelled,' or whether it was not necessary to repeat in that part of the indictment that the shawl was the property of A. B., but the indictment sustained in respect of the practice. *Jane M'Mahon or M'Graw*, Glasgow, April, 22, 1863, p. 381.
4. A panel A. was charged with Theft, in so far as, having, time and place libelled, found a pocket-book and bank notes that had been stolen from or dropped by B., he had wickedly and feloniously appropriated the same to his own uses; well knowing that the same were the property of B., 'or at all events that the same were not the property of you the said' A. The libel found irrelevant, in respect that it did not sufficiently set forth guilty knowledge and appropriation on the part of the panel. *Angus M'Kinnon*, High Court, May 25, 1863, p. 398.
5. Circumstances in which an objection that the panel was wrongly named in the indictment was *repelled* after a proof. *John and Hannah Burnside*, Jedburgh, Sept. 8. 1863, p. 440.
6. The designation of a Prisoner as 'now or lately prisoner in the 'prison of Glasgow,' held sufficient although there was another panel indicted for the same Circuit under the same name and

**THEFT**—*continued.*

designation, and charged with the same crime. *Mary M'Lean*, High Court, Dec. 7. 1863, p. 449.

7. Circumstances in which, in a trial for theft aggravated by previous conviction, the aggravation held not sufficiently proved by the production of two extracts or certificates of convictions in Ireland, spoken to by an Irish constable. *John Docherty*, Glasgow, April 22, 1864, p. 501.

**THREATENING LETTERS.**

1. *Question*, Whether or not the purport or object of the alleged threats must be set forth in the major proposition of the criminal libel in the Sheriff Court, charging the crime 'of sending threatening letters.' Sentence proceeding on a verdict under the above charge, finding the panel 'guilty as libelled 'of writing letters of a threatening tendency,'—set aside with expenses. *Gray v. Mackenzie*, High Court, February 25, 1862, p. 166.
2. *Held*, that the term 'Threatening Letters' is not a *nomen juris*, and that an indictment which simply libelled the 'wickedly and feloniously writing and sending threatening letters,' was not relevant. *James Miller*, High Court, November, 24, 1862, p. 238.

**TIME**,—**LATITUDE OF.**

Circumstances in which, in an indictment for theft by house-breaking, objections to the latitude in respect of time were repelled, the accused being a night-constable, and in that capacity having had opportunities and facilities for breaking into and entering the premises from which the goods were stolen. *Alexander Glennie*, High Court, June 2, 1864, p. 536.

See **FORGERY**. **SUSPENSION**.

**TIME OF TRIAL**. See **LIBERATION**.

**TROUT-FISHING**. See **STATUTE 8TH AND 9TH VICT. c. 26**.

**USING AND UTTERING**. See **FABRICATION OF FALSE ACCOUNTS**, **FORGERY**.

**VERDICT**. See **FORGERY**. **MURDER**. **SUSPENSION**.

**WARRANT TO APPREHEND AND DETAIN**. See **STATUTE 1701 c. 6**.

**WEIGHTS AND MEASURES**. See **SUSPENSION**, 11.

**WICKEDLY AND FELONIOUSLY HAVING CARNAL KNOWLEDGE OF A WOMAN WHEN ASLEEP, &c.**

A panel convicted on the above charge sentenced to ten years penal servitude. *William M'Ewan or Palmer*, Dumfries September, 26, 1862, p. 227.

**WILFUL AND MALICIOUS MISCHIEF**. See **MALICIOUS MISCHIEF**.

**WILFUL FIRE-RAISING.**

Objection to the relevancy of an indictment for wilful fire-raising, or attempt to commit wilful fire-raising, in so far as it charged the burning of certain movables—*repelled*, on the ground that the burning of these was merely set forth as part of the narrative, *Patrick Anderson*, Glasgow, Oct. 1, 1861, p. 95.

**WITNESS.** See **ASSAULT.** **EVIDENCE.**

**END OF VOL. IV.**







